Supreme Court, U.S.
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No._____

UNITED STATES SUPREME COURT

THOMAS MITCHELL,
PETITIONER

V

DR. BERNARD KATZ, ET AL.,
RESPONDENTS

"ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT"

"PETITION FOR WRIT OF CERTIORARI"

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30pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court Or Appeals for the First Circuit erred when it affirmed the District Court's decision to deny the plaintiff's motion to dismiss the three motions of the defendants to dismiss the plaintiff's complaint because the defendants' failure to comply with local rule 7.1 (A) (2) of the federal rules of civil procedure?

2. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to allow the motion to dismiss Messrs. Leinbach, Mcgrath, Miles and Pfeiffer for lack of jurisdiction?

3. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to allow the defendants' motion to dismiss the plaintiff's complaint for failure to state a claim?

4. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to deny the plaintiff's motion for A T.R.O. enjoining defendants to render prompt and immediate medical examination, care and treatment to head, and all other injuries received?

5. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to dismiss without prejudice Sua Sponte CT Corporation System for plaintiff's failure to effect proper service when proof of proper service was filed with the court?

6. Whether the United States Court of Appeals for the First Circuit erred when it affirmed the District Court's decision to dismiss the petitioner's case?

7. Whether the United States Court Of Appeals for the First Circuit erred when it affirmed the District Court's decision to deny the petitioner a default against Dr. A. J. Ajeena?

No._____

UNITED STATES SUPREME COURT

Thomas Mitchell
V.
Dr. Bernard Katz

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[Each] defendant named in this civil action.

RESPONDENTS

[Note: Past corporate names and misspelled names of Correctional Medical Services, Inc. have been deleted from the list of Defendants-Respondents previously printed, however no Defendants-Respondents have been added nor removed from this civil action through the above deletions of names that are no longer applicable. The above is a list of the proper Defendants-Respondents in this civil action.]

[Note: All respondents are respondents in their official and individual capacities.]

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the First Circuit.

Citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies

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The citations of the official and unofficial reports of the opinions and orders entered in the case by courts or administrative agencies listed below are all unpublished. They are (1) order of court dated 7/2/97, docket # 80; (2) order of court dated 7/14/97, docket # 88; order of court dated 7/29/97, docket # 98; order of court dated 11/7/97, docket # 143; order of court dated 1/3/98, docket # 161; order of court dated 3/19/98, docket # 163; report and recommendation dated 6/24/98, docket # 173; Order of United States Court of Appeals dated 5/27/98, docket #175; Endorsed order of court dated 6/24/98, docket --; Endorsed order of court dated 7/31/98, docket --; Endorsed order of court dated 8/3/98, docket --; Order of court dated 8/6/98, docket # 176; Order of court dated 11/24/98, App. # 98-2260; Order of court dated 1/11/99; APP. # 98-2260; Order of court dated 3/15/99, App. # 98-2260; Notice and Opinion of U. S. Court of Appeals dated3/15/99, App.#98-2260; Order of court dated 8/10/99, App. # 98-2260; Order of court dated 8/25/99, App. # 98-2260; Order of court dated 8/26/99, App. # 98-2260; Opinion of court dated 8/31/99, App. #98-2260; judgment of the U. S. Court of Appeals for the First Circuit entered 12/30/99; Denial of request for rehearing entered 2/28/2000; Return of Petition for Writ of Certiorari by the clerk of the U.S. Supreme Court dated May 31, 2000 for non-compliance with the rules of the court together with a statement by the clerk of this court to kindly correct the petition and appendix so that it complies in all respects with the rules of the court and return it promptly so that it may be

docketed. Full text of all orders of court, opinions and directives above are unpublished but are reprinted in the appendix as indexed in the appendix.

The judgment of The United States Court of Appeals for the First Circuit was entered on December 30, 1999. The order of court denying the petitioner's request for a rehearing was entered on February 28, 2000.

STATEMENT OF JURISDICTION

The court has jurisdiction to review this petition with respect to this case, pursuant to 28 U.S.C. §1254 (1).

The notifications required by Rule 29.4 (b) and (c) are being made in conjunction with the filing of this petition.

Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations involved in this case.

Citations of the Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations involved in this case are provided below and the pertinent text is set out in the Appendix as indexed.

Title 42 U.S.C. §1983, §1985 (3); Title 28 U.S.C. §1332 et seq. [Diversity of Citizenship] subsections: (a) (1), (2), (3), (4), and (c) (1) A; §1343, §1651, §2201, §2202; United States Constitution, Articles 3 et seq., 4 et seq., 6et seq., 1st, 4th, 5th, 7th, 8th, 9th, 10th, and 14th Amendments to the Constitution; Title 18 U.S.C. §1962, 1964, Civil RICO. 18 U.S.C. §(2) 1961 (1)(B), Par. 1, Page (9), (15), Par. 2 Page. 21; 18 U.S.C. §(2) 1962, Par. 2 Page 3, Par. 2 Page 16; 18 U.S.C. §1962(b-d), Par. 1 page 15, par 2 page 21; 18 U.S.C. §1964, par.2 page 3, par. 2 page 17; 18 U.S.C. 1964 (c), par.

1 page 15, par. 2, page21; 28 U.S.C. §1332 ET Seq. Sub sections (A)(1), (2), (3), (4) and (e) (1)A, par. 2, page 3, alluded 2 as a citizen of a foreign state address and Messrs, Leinback, Miles Pfeiffer and McGrath are defined as citizens of a foreign state, page iii and iv, included to the last sentence of par. 2 page 6, throughout the statements made in par 2 and 3 of page 7 and par 1 of page 9, in par. 2 page, 12, par. 2 page 17; 28 U.S.C. §1341, par. 1 page 15, par. 2 page 17, par. 2 page21; 28 U.S.C. §1343, par.2 page 3, par. 1 page 15, par. 2 page 17, par 2 page 21; 28 U.S.C. 1651 Par. 2 page 3, par. 2 page17; 28 U.S.C. §2201 par 2 page 3, par. 2 page 17; 28 U.S.C. 2202, par. 2 page3, par. 2 page 17; 28 U.S.C. 1254 (1), par. 4 page 2; 28 U.S.C. A, par. 1 page 15, par. 2 page 21; 28 U.S.C. § 2403, par. 3 page 27; 42 U.S.C §1983, par. 2 page 3, par 2 page17; 42 U.S.C §1985, (3), par. 2 page 3, par. 2 page 17; United States Constitution Article 3 et seq., par. 2 page3, par. 2 page 17; Article 4 et seq., par 2 page 3, par 2 page 17; article 6 et seq., par. 2 page 3, par. 2 page 17; 1st Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 4th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 5th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 7th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 8thAmendment to the Constitution Par. 2 page 3, par. 2 page 17; 9th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 10th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; 14th Amendment to the Constitution Par. 2 page 3, par. 2 page 17; Fed. R. Civ. P. 4 (C) (2) (A), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 1 page 25; Fed. R. Civ. P. 4 (C)(A), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 1 page 17; Fed. R. Civ. P. 4 (c)(c), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 1 page 17; Fed. R. Civ. P. 4 (C)(A), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 2 page 16, par. 1 page 17; Fed. R. Civ. P. 4 (c)(2)(A), sub par (A), (B) or (C), par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 2 page 16, par.1 page 17; Fed. R. Civ. P. 4 (d)(1) or (d)(3), Par. 2 page 3, par. 2 page 11, par. 3 page 15, par. 2 page 16; Fed. R. Civ. P. 4(C) – (ii) par 2 page 3, par. 2 page 16; Fed. R. Civ. P. 9(b), par. 1 page 15, par. 2 page 21; Fed. R. Civ. P.55(a), par 2 page 3, par 1 pate 17; Local Rule 7.1 (A), (2) of the Fed. R. Civ. P.

par. Page 3, par. 1 page 5 par. 1 page 14, par. 1 and 2 page 18, par. 1 page 22; Fed. R. Civ. P. 16(b), par. 1 pages 5; M.G.L ch. 181, Par. 2 pages 19; 28 U.S.C § 1291, (statue allowing the U. S. Court of Appeals to hear the appellant 's appeal in this case)). It is found in par. 2 page 2 of the brief of the appellant.

Statement of the Case

Petitioner, Thomas Mitchell, a person in state custody received several serious injuries in an accident caused by another inmate while imprisoned at MCI-Concord. Due to lack of proper medical examinations to determine the extent of his injuries and lack of proper medical care for other injuries he suffers much unnecessary pain, emotional stress, known permanent impairments and possible future impairments. He, in an effort to obtain proper medical examinations, care and monetary damages for violation of his civil rights and losses to his business and property, both present and future to the extent that can be calculated, filed a complaint, Pro Se in the United States District Court for the First Circuit as the defendants were from different states. He considered the decisions of the District Court were improper, and appealed its decisions to the United States Court of Appeals for the First Circuit. On December 30, 1999 the Court of Appeals issued judgment affirming the decisions of the District Court.

It appeared the decisions made by the United States Court of Appeals [hereinafter referred to as "Court of Appeals"] were improper and some decisions were contrary to past decisions it had made where the matters to be decided were the same as in this case. Other decisions it made decided an important federal question in a way that not only conflicts with relevant decisions of the majority of the Justices of the United States Supreme Court but challenges their decision, holdings and statements of Justice Scalia in Carlisle v United States, 517 US 134 L.ED 613 S. Ct. (94-9247).

The petitioner herein is petitioning the United States Supreme Court for Writ of Certiorari requesting this Court to

review the United States Court Appeal's affirmation of certain decisions made by the United States District Court for First Circuit [hereinafter referred to as the "District Court"] which these affirmation he feels are bias, contrary to past decisions of the Court of Appeals and United States Supreme Court as will be described more fully later in this petition. Facts material to consideration of the questions presented for review are listed below in the same numerical order as above presented.

1. Facts material to consideration of the first question are: (1) The Court of Appeals should not have affirmed a decision of the District Court it knew or should have known the District Court had no inherent power to make. In Carlisle v United States, (supra) Justice Scalia, speaking on behalf of the majority of the Justices of the Supreme Court in their concurring opinions and holdings said: "Whatever the scope" of the power [referring to the inherent power of the District Court] it ends where the Federal Rules begin. "Caselaw does not establish any 'inherent power' to act in contravention of applicable Rules". "Federal Courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." These Rules are intended to provide for the just determination of every proceeding. Justice Scalia further said: "District Judges may regulate their practice in any manner consistent with Federal Law, these Rules and Local Rules of the court. (2) The clarity of this local rule 7.1(A)(2) makes it impossible not to fully understand it and comply with it; (3) This rule stands entirely on its own and refers to all motions not just certain motions filed at a particular stage of litigation. The exemptions stated in Fed. R. Civ. P.16(b) are not applicable to any other rule and are stipulated for a certain stage of litigation only. Local rule 7.1(A) (2), of the Federal Rules of Civil Procedure for the District of Massachusetts, the Rule involved in this question states: "No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." (4) The petitioner sent a letter to the attorneys of record in this case two different times, requesting a meeting to narrow the issues but the Defendant's lawyers refused to meet unless the

petitioner met for the purpose of releasing the defendants from this civil action. Full text of letter reprinted in appendix. The petitioner states, upon a proper habeas corpus being sent to the institution where he resides prior to the date the meeting was scheduled for he would be transported to any court for legal purpose. A meeting could be arranged in one of the conference rooms of a courthouse near the offices of the attorneys for the respondents for the purpose of complying with the above rule on any business day. State transportation is provided for an inmate to all courts and medical facilities on a daily basis at no cost to either party thus no inconvenience or hardship is incurred by anyone. No request for a meeting either in person or by telephone has ever been received by the petitioner from any respondent or their attorney.

2. Facts material to consideration of the second question are: The medical contract between Correctional Medical Services, Inc. [hereinafter referred to as CMSI] and the Department of Correction [hereinafter referred to as DOC] was negotiated by Mr. William G. Leinbach with assistance from the above respondents who advised him of the requirements Correctional Medical Services, Inc. [known as ARA Health Services, Inc. d/b/a Correctional Medical Systems at the negotiations and signing of the Medical Contract] wanted in this contract if it was to be accepted by this entity and further advised him of the costs and profit they would agree to. They advised and assisted Kevin McGrath in the design and implementation of the policies concerning the provisions of medical care that was to be administered. The contract that was accepted and agreed to by the officers of the medical provider contained a Forum Selection Clause, which required all claims arising under the contract to be filed in the state or federal courts within Massachusetts. It has been held that parties to an agreement that contains a Forum Selection Clause can be said to have waived their right to challenge the designated forum's jurisdiction over them. In this contract the respondents agreed together with DOC to make all reasonable efforts to cooperate with each other in the defense of any litigation

brought by any person not a party to this agreement including suits that concern services, the program, or by this agreement. It is stipulated that the provider and personnel shall appear at court for various court hearings and such civil litigation matters as are deemed appropriate by the Associate Commissioner for Health Services and the program director on a case by case basis. The respondents agreed to the above terms of the Forum Selection Clause of the medical contract by their written signature on the contract and they as principal officers of CMSI and as such should be held to their agreements.

The contract also states "The provisions of this section [III(F)] shall survive the expiration or termination of this agreement. [Cooperation in Litigation section of medical contract reprinted in appendix, indexed #6] as CMSI is a corporation filed with the Secretary of the Commonwealth of Massachusetts it and its officers must comply with its laws and regulations. The principal and other officers of a corporation filed under the laws of the Commonwealth of Massachusetts must allow the Commonwealth and its courts to have jurisdiction over them. As the principal officers of CMSI agreed to the wording and phrasing of the Forum Selection Clause in the medical contract they must have been aware that if litigation were to commence concerning matters stipulated in the Forum Selection Clause it would be they who negotiated it, agreed to its terms and implemented its policies that would most likely be called to testify in a court or at a hearing in the Commonwealth of Massachusetts where they agreed all litigation should be filed.

Correctional Medical Services, Inc. is considered an artificial person having a legal entity entirely separate and apart from the individuals who compose it and those who make it do as commanded. The Secretary of the Commonwealth approves its by-laws, which control its activities. Its by-laws cannot contain any purpose that is illegal or dishonest as an act of the corporation. As it is inanimate its officers who act on its behalf must control it. Its officers make it perform its acts therefore any deviation from its by-laws is unauthorized. Correction Medical Services, Inc. is being paid according to the terms of its

contract to provide proper medical care to each inmate residing in the Massachusetts Prison System for each day of the inmate's residency in the institutions operated by the DOC, however, proper medical care is not being provided. CMSI policies, set in place by the CMSI respondents controlling medical care must be in accordance with the terms it agreed to in the medical contract. (see appendix index # 7) Deviations from the terms of this contract become an activity of the officers controlling its activities not the corporation. Negotiation of an agreement the corporation does not intend to fulfill or cannot afford to fulfill is not an act of the corporation but rather an act or its officers personally.

Testimony by CMSI employees before the Massachusetts Legislature [reprinted in Appendix index # 8] and affidavits previously filed in this case attest to the improper medical care provided to inmates, an act that cannot be construed to be a lawful act within the by-laws of CMSI and cannot be said to be an act done on the basis of his or her employment by the corporation whether as an officer or other employee, therefore it becomes a personal act and direct involvement in a decision which in this case is causally related to the injurious care being provided to the petitioner [hereinafter referred to as "Mitchell"] which is causing further injury. For the above reasons jurisdiction over respondents, Messrs, Leinbach, McGrath, Miles and Pfeiffer is warranted under the Massachusetts long-arm statute. Their tortuous actions/ inactions are denying Mitchell adequate medical care.

3. Facts material to consideration of the third question are: (1) It has been established that he has suffered a broken wrist and due to improper medical care by Dr. A.J. Ajeena. Physical therapist, Michael Auardi, of Lemuel Shattuck Hospital stated in his written report that Mitchell lost 55% of the range of motion in his left wrist since it was broken. He stated to Mitchell that the loss of range of motion was due to the ace bandage being left on his wrist too long. Dr. Ajeena has contradicted this report after reviewing it and never responded to Mitchell's complaint after personally receiving

it. The ace bandage caused the tendons in Mitchell's left wrist and hand to contract. Some type of medical care will be required to keep the tendons from causing continuous pressure, which is causing internal bleeding in the back of the left hand. Future medical issues may result which would further restrict the use of Mitchell's left hand and wrist. As electronic equipment is essential to Mitchell in his business he must try to retain the use of both hands.

The second claim that could be allowed is the allowance of the T.R.O. requesting proper medical examinations to determine the cause of his blurry vision and instant memory loss, both of which were suffered as a result of the fall he endured at MCI-Concord. Claims for monetary compensation for losses could be scheduled for trial before a competent jury as established losses should be compensated for in a fair way.

4. Facts material to consideration of the fourth question are: At the time Mitchell was sent to the Hospital Service Unit after his fall he should have been completely examined for any injuries he may have sustained. The Physicians Code of Ethics require a physician to completely examine their patient including X-rays to determine the extent of his/her injuries suffered after the patient has been involved in an accident. Mitchell is a heavy built man, at the time he fell he was in his late sixties. This severe fall caused known serious injuries and possible unknown serious injuries especially to his head as his head hit hard on the concrete and steel floor of the second tier. Dr. Angeles, although admitting she never had any experience with the type of injuries Mitchell experienced, should have been aware of her obligations. She was the medical director at MCI-Concord.

Mitchell was required to submit written requests for medical care to CMSI for 59 days before Dr. Angeles allowed an x-ray, which showed that Mitchell was enduring extreme pain because he had 3 broken crushed ribs. The blurry vision and instant memory loss are not painful but they cause emotional stress as Mitchell doesn't know if it will lead to blindness and total loss of memory which would not only

imprison him for the rest of his life but would cause severe losses to his businesses and property.

5. Facts material to consideration of the fifth question are: (1) F.R.C.P. 4(c) (2)(A) states: "A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and is not less than 18 years of age". F.R.C.P. (c)(c) states: "A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule, (ii), by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, return receipt requested, a copy of which was filed in the District Court. Receipt of service by the above acknowledgment was not received by Mitchell but he did receive a letter on CT Corporation stationary signed by Michelle Larkin, Process Specialist, stating the copy of the summons and complaint had been received by CT Corporation System and was being sent back to Mitchell requesting advice as to whom to send it to. [text of letter reprinted in App., index # 9] Mitchell sent back a letter stating CT Corporation System was the Defendant to whom the copy of the summons and complaint was intended. (All letters have been filed in the District Court) [test of letter reprinted in App., index #10]. The summons and complaint was delivered by [a mailman], a person who is not a party to this civil action and was at least 18 years of age when he delivered the copy of the summons and complaint. (Letter from the U.S. Postal Service attesting to mailman's age filed in record.)

Delivery of the copy of the summons and complaint was addressed to Edward Gwisdalla, CT Corporation System as he is the agent for CT Corporation, 2 Oliver Street, Boston, MA 02108. Valerie Johnson received it the second time. She is a process specialist and a person who normally

receives service of process at the office of CT Corporation System and the person who signed the second letter stating CT Corporation had received a copy of the summons and complaint. She also receives service of process on behalf of other corporations. This defendant is especially important as it is listed as the Clerk of Correctional Medical Services, Inc. and as required is the only clerk of this corporation with a Massachusetts residency. It is the only clerk that could certify the vote of Correctional Medical Services, Inc. as it applies to contracts as Massachusetts requires the clerk of a corporation to live in the Commonwealth. Edward Gwisdalla, agent for CT Corporation System and addressee named on the package containing the copy of the summons and complaint which was delivered to 2 Oliver Street, Boston, MA 02108. CT Corporation System sent the second copy of the summons and complaint back to Mitchell together with a letter on CT Corporation System stationary signed by Valerie Johnson, Process specialist stating she was returning the copy of the summons and complaint. [Valerie Johnson] is a general agent who receives service of process at CT Corporation System] A copy of this letter was filed with the court and [the text of this letter is reprinted at App. # 11]. There is much proof that service of process was properly made to CT Corporation System thus making the decision of the lower courts seem bias and improper. CT Corporation was certainly notified of the civil action in which it is a defendant; has acknowledged receipt of each copy of the summons and complaint in the letters it sent to Mitchell an both copies were served properly as above stated. The above letters form CT Corporation System and from Mitchell to CT Corporation System have been timely filed with the court and the text of each reprinted in the appendix. No answer has ever been received from the above corporation nor has an answer to Mitchell's complaint ever been filed in the court even though Mitchell tried in every way to explain the need for an answer. A default against this defendant is warranted, not a dismissal. The court should not defend a defendant when it is not warranted. Rule 4 has been complied with as required.

6. Facts material to consideration of the sixth question are: The defendants motions to dismiss Mitchell's complaint should have been dismissed as they were not filed in compliance with local rule 7.1(A)(2) of the Federal Rules of Civil Procedure for the District of Massachusetts which the majority of the Justices of the United States Supreme Court state cannot be circumvented. Carlisle v United States, (supra). Local rule 7.1(A)(2) [Motion Practice] states: "No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue." Allowance of a motion that was not filed in accordance with the above local rule cannot be allowed.

In Carlisle v United States, the Justices of the U.S. Supreme Court state: Federal Courts have no move discretion to disregard the rule's mandate than they do to disregard constitutional statutory provisions." Also, in New England Data Services, Inc. v Becher 829, F.2d 286, 288 (1st Cir. 1987) the Court of Appeals, Torruella, Circuit Judge, held that: the rule requiring a party to plead fraud with particularity applies to civil RICO actions; (2) in a civil RICO mail fraud and wire fraud case, dismissal should not be automatic once the District Court determines the rule has not been satisfied if the specific allegations make it likely that the defendant used interstate mail telecommunications facilities and that the specific information as to use is likely to be in the exclusive control of the defendants; and (3) the District Court abused its discretion in dismissing the complaint without permitting further discovery.

FEDERAL CIVIL PRODCEURE –1789

District Court should not have dismissed without further discovery, civil action under Racketeer Influenced and Corrupt Organization Act alleging mail fraud and wire fraud where plaintiff provided outline of general scheme to defraud and established inference that mail or wire fraud was used to transmit scheme; requiring plaintiff to plead time, place, and contents of communication between defendants, without allowing some discovery in addition to interrogatories, was unreasonable. 18 U.S.C. §§1341, 1343, 1961(1)(B), 1962(b-d), 1964(c); Fed. R. Civ. Proc., rule 9(b), 28 U.S.C.

7. Facts material to consideration of the seventh question are: 4(c)(2)(A) states: A summons and complaint shall, except as provided in subparagraphs (B) and (C) of this paragraph, be served by any person who is not a party and not less than 18 years of age. F.R.C.P. rule 4(c)(C) states: A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule (ii) by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served by mailing a copy of the summons and of the complaint (by first class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3). Subdivision (d)(1): Upon an individual other than an infant or an incompetent person, by delivering a copy of summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or by leaving copies there of at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

The defendant, Dr. A. J. Ajeena was served a copy of the summons and of the complaint by first class certified mail both at his place of business and at his usual place of abode. The plaintiff received no answer and a second copy of the summons and of the complaint was delivered to the defendant personally by a person who is at least 18 years of age and not a party to the action. As rule (C)(ii) states, "if no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3). Rule (A)

states: "A summons and complaint shall be served by any person who is not a party and not less than 18 years of age. There are no stipulations stating who "any person" must or must not be therefore a mailman who is at least 18 years of age and not a party may serve a copy of a summons and complaint to a defendant after no acknowledgement of service under Rule 4(C)(ii) has been received by the sender. After complying with Rule 4(C)(ii) the sender received no reply or acknowledgment and he had a copy of the summons and complaint served in compliance with Rule 4(c)(A) to Dr. A. J. Ajeena personally and a receipt signed by Dr. A. J. Ajeena attesting to his receipt of the copy of the summons and complaint, a copy of which has been filed with the Court. As no reply or answer to the summons and complaint has ever been filed or received by the Mitchell the court must allow the petitioner a default against this defendant pursuant to Rule 55(a) of the F.R.C.P. Copies of medical reports containing Dr. A.J. Ajeena's signature have been filed with the court so that his signature on the return receipt receiving the copies of the summons and complaint may be ascertained. A copy of a letter from the U.S. Postal Service ascertained being filed explaining and proving delivery by a Postal Service Employee is in compliance with F.R.C.P. Rule 4(d)(1). [A copy of the text of the letter from the U. S. Postal Service is reprinted in App. # 12].

The Court Of Appeals erred when it affirmed the decision District Court which showed prejudice as its decisions is contrary to the Federal Rules of Civil Procedure. The petitioner is filing in the appendix a copy of a medical report signed by Dr. A. J. Ajeena so this court may examine the signature against the signature of Dr. A. J. Ajeena on the return receipt for the copy of the summons and complaint to insure it was he who received the copy of the summons and complaint.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The basis for Federal Jurisdiction in the Court of First Instance is established under Title 42 USC §1983, §1985(3) Title 28 USC §1332 et seq., subsections: (a) (1), (2), (3), (4),

and (c) (1) A; §1343, §1651, §2201, §2202; United States Constitution, Articles 3 et seq., 4 et seq., 6et seq., 1st, 4th, 5th, 7th, 8th, 9th, 10th, and 14th Amendments to the Constitution; Title 18 U.S.C. §1962, 1964, (Civil RICO).

DDIRECT AND CONCISE ARGUMENT AMPLIFING THE REASONS RELIED ON FOR ALLOWANC OF THE WRIT

1. The petitioner, Thomas Mitchell, is relying on the allowance of a Writ of Certiorari because affirmation by the United States Court of Appeals of the District Court decisions in this case seems somewhat prejudice. Mitchell avers he has proved proper service of process to Dr. A. J. Ajeena and CT Corporation System in compliance with the F.R.C.P.; he avers the decision to deny his motions to dismiss the motions of the defendants to dismiss his complaint because of their failure to comply with Local Rule 7.1(A)(2) of the F.R.C.P. conflicts with and challenges the decisions and holdings of the justices of the United States Supreme Court in Carlisle v United States, 517 US 134 L.Ed 613 S.Ct. (No. 94-9247).

He avers allowance of the defendants' motions not filed in compliance Local Rule 7.1(A)(2) challenges the authority of the Justices of this Court as the lower courts do not abide by their decisions or holdings. This court must decide if the agreements contained in the "Forum selection clause" can be upheld so that jurisdiction is achieved over the defendants who are parties to this agreement by the courts of the Commonwealth. The issuance of a Writ of Certiorari will allow this court to decide if the agreement between CMSI and DOC is enforceable allowing jurisdiction by the courts of the state if the state is sued and the only intelligent testimony may be had from the parties to the Forum Selection Clause who are from out of state as in the case at bar. It will allow this court to settle this important question of federal law that has not been, but should be, settled by this court as it is of significance to a large professional group of litigators, a large populace of defendants, states and litigators drafting agreements such as the medical contract; it will greatly

reduce the cost of litigation, including in this case, the Commonwealth of Massachusetts; it will allow a decision to be made that will establish the sincerity of the parties to an agreement of this type by providing sanctions for refusal to abide by the agreement.

Large corporations and federal and state government usually include a forum selection clause in contracts assuming it guarantees jurisdiction and availability of the parties to the agreement especially officers of a foreign corporation to appear and testify at hearings and courts as required. It should define the existence or jurisdiction over officers of a foreign corporation, filed as required, [in this case by M.G.L.ch.181] and a party to a long term contract with the forum state [in this case, the Commonwealth of Massachusetts] requiring cooperation between the parties in suits and claims arising out of the [in this case medical contract, its programs, services and products sold] by anyone not a party to the contract commenced in the federal and state courts with the [in this case, the Commonwealth] the courts selected for litigation of all claims and suits by the above. It can decide if the above clause or agreement can be upheld to satisfy jurisdiction of the parties.

In this case CMSI hired men with the qualifications required by the Commonwealth to negotiate the contract, formulate and implement acceptable policies supposedly commensurate with the terms of the medical contract for the provision of proper medical care to inmates as required by DOC to inmates under its care and custody. These men, all officers of CMSI negotiated and agreed to the terms of the Forum Selection Clause and the medical contract. However, four months after the medical contract was signed the officers, Leinbach who negotiated the contract and Forum Selection Clause and McGrath who formulated and implemented the policies concerning the administering of health care were allowed to resign on the same day, four months after the medical contract was signed.

These are the men who would most likely be requested to the issues involved in this case especially to the administration of health care to Mitchell. CMSI is a national managed healthcare provider to prisoners and other persons.

Issues concerning managed healthcare providers are the subject of discussion presently in the United States congress. Most managed healthcare providers are foreign corporations outside of their state of incorporation. The decisions concerning jurisdiction will be cited by thousands of litigators in thousands of cases in the courts of every state and perhaps by counsel representing officers of these foreign corporations if subpoenaed by the federal or state courts or ever congress. As other employees of these corporations would be affected by jurisdictional issues a large portion of the population could be affected by the decisions of this court in this case as will congress in the formulation of future decisions concerning managed healthcare providers. The United States Court of Appeals for the First Circuit has decided the question of jurisdiction in Mitchell's case, however, this decision has not been, but should be, settled by this court as its decision will lessen the cost of litigation for a great portion of the population of the United States, the federal and state courts and government and clarify a very important federal question. This decision is vital to the justice of the federal and state courts of the United States and its territories. Federal and state court time saved would be astronomical, greatly reducing a segment of their caseload.

2. Whether the Court of Appeals affirming the District Court's dismissal of Mitchell's complaint is in conflict with its decision in New England Data Services, Inc. v Becher on the same important matter should be decided by this court. In New England Data Services, Inc. v Becher (supra) Judge Torruella, then Circuit Judge of the United States Court of Appeals for the First Circuit held: "that in a civil RICO mail fraud and wire fraud case, dismissal should not be automatic once the District Court determines the rule has not been satisfied if the specific allegations make it likely that the defendant used interstate mail telecommunications facilities and that the specific information as to use is likely to be in the exclusive control of the defendants; and (2) the District court abused its discretion in dismissing the complaint without permitting further discovery." He further held: "District Court should not have dismissed, without further discovery, civil action under the Racketeer Influenced and

Corrupt Organization Act alleging mail fraud and wire fraud where plaintiff provided outline of general scheme to defraud and established inference that mail or wire fraud was used to transmit scheme; requiring plaintiff to plead time, place and contents of communication between defendants, without allowing some discovery in addition to interrogatories, was unreasonable. 18 U.S.C. §§1341, 1343, §1961(1)(B), §1962(b-d), §1964(c); Fed. R. Civ. Proc., Rule 9(b), 28 U.S.C. This court should review the above decision of the District Court as it appears Mitchell's case and the above captioned case were decided by the United States court of Appeals in conflict with each other in the same important matter. (3) Allows this court to settle an important question of federal law previously thought to be settled, however, due to the decision of the United States court of Appeals for the First Circuit affirming the decision of the District Court to deny Mitchell's motions to dismiss the motions of the defendants to dismiss Mitchell's complaint because of the defendants' failure to comply with local rule 7.1(a)(2) of the Federal Rules of Civil Procedure. The decisions of the above lower courts are not only in conflict with the holdings of this court in Carlisle v United States, (supra) but challenge the authority of the holdings of this court in the above cited case. In the above-cited case the justices of this court held that "federal courts have no more discretion to disregard the rule's mandate than they do to disregard constitutional or statutory provisions." The justices of this court further held that "whatever scope" of the power (referring to the inherent power on the District Court) it ends where the federal rules begin. Justice Scalia, on behalf of a majority of the justices of the United States Supreme Court stated: "district judges may regulate their practice in any manner consistent with federal law, these rules and local rules of the court. This court is requested to review the decisions of the lower courts in this matter and provide a decision, which will decide whether or not the lower courts should abide by the holdings of this court in their decisions. This will certainly decide a federal question that will affect the outcome of this case and cases in the federal courts being litigated at this time by thousands of litigants and provide the lower courts and

litigants with proper course of litigation and results they can depend on; (4) It will allow this court to decide an important federal question brought about because of a decision of the United States Court of Appeals in this case that conflicts with relevant decisions of this court concerning the same matter. In this case Mitchell is appearing pro se. In the report and recommendation of the district court, magistrate-judge Swartward states: "Mr. Mitchell is proceeding pro se and therefore, I am required to construe his pleadings liberally. See: Haines v Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 595-96 (1972); Feliciano v Dubois, 846 F. Supp. 1033 (D.Mass. 1994)" Further on he states: "Reading Mr. Mitchell's complaint liberally, I find that plaintiff's complaint seeks relief for the following claims"; He lists each count and explains what each claim is for but purposely omits Mitchell's request for a T.R.O. He never construed the request for his T.R.O. liberally. If he had he would have construed it as a request for proper medical examinations to determine the extent of Mitchell's injuries which cause instant memory loss and blurry vision. In McGuckin v Smith, 974 F.2d 1050, 1060 (9th Cir. 1992) this court held that a medical condition can be classified as serious if it "significantly affects an individual's daily activities." In Strickler v Waters, 898 F.2d 1375 (4th Cir. 1993) the court held there must be evidence of a serious medical or emotional deterioration attributable to the challenged condition. In this case pain is not the cause of emotional deterioration rather the lack of knowledge of the medical issues in the future that may affect Mitchell's life because of denial of his request for medical examinations and care.

In Mitchell's case both the doctors and the technicians employed by CMSI told Mitchell they knew internal injuries may exist as a result of his fall but because of the cost involved they did not think anything would be done to correct his condition. In a written report, an employee, John McClintock, stated he was requested to do memory testing on Mitchell and he was refusing.

Documentation of this report and event is contained in docket #101. This constitutes deliberate indifference to

the medical needs of Mitchell. He knew of the risk of future harm.

The request for proper medical examinations and care should be allowed by virtue of the medical contract which provides for proper medical care including examinations to determine injuries and the cause of illness suffered by inmates residing under the care and custody of DOC in institutions operated by DOC. A liberal understanding of the denial of Mitchell's request for proper medical examinations and care as requested in the T.R.O. above is the denial of the medical care provided in the medical contract. It is apparent that "required to construe pleadings liberally" should be decided and defined by this court in its decision when it concerns a request for medical care. It should also be decided if the lower courts should be allowed to allow a medical provider, being paid by the state to provide the care the state is charged by law to provide to withhold medical care. The medical examinations and care requested were to eliminate the conditions affecting his daily activities; (5) It will allow this court the opportunity to determine if the United States Court of Appeals for the First Circuit has decided an important question of federal law that has not been, but should be , settled by this court and also allow this court to determine if the lower court erred in its decisions to deny defaults in this case because it was advised by its clerk that Mitchell did not properly reserve the defendants, Ajeena and Ct Corporation System when in fact he did properly reserve these defendants and filed proof o this reservice of process to the court but the clerk of court never filed the proof of the second service of process. The objections to the report and recommendation of Magistrate Judge Swartwood, although sent to the court in a timely manner were purposely never filed by the clerk of court. A return receipt signed by the officer of the district court that normally receives mail on behalf of the court shows the objections were filed in a timely manner. The filing of this document is pivotal. If no objections are filed to the magistrates report and recommendation within 10 days of receipt of the report and recommendation an appeal cannot be filed. This purposeful act of the clerk of the U.S. District Court was meant to keep

Mitchell from pursuing an appeal as the Appellate Court would not have jurisdiction to hear the appeal. Proof of proper service of process to Dr. A. J. Ajeena and Ct Corporation System has been filed; Service of Process in compliance with F.R.C.P. 4(c)(2)(A) as detailed in facts material to consideration of the fifth question commencing on page [8] of this petition and continuing through pages 9 and 10, ending on page 10. Proof of Dr. Ajeena's signature is substantiated by his signature on his medical report. Mitchell filed all papers and documents in the courts by mailing them certified mail, return receipt requested so as to be able to file proof of receipt of the documents by the courts and retain proof the documents were received by the courts in a timely manner for filing. Although fairplay is expected of the federal courts at least twice the district court signed for and received documents in a timely manner for filing but never filed the documents. The last page of the report and recommendation of Magistrate Judge Swartwood contained notification that objections to his report and recommendation must be filed in the court within ten days of receipt of receiving the report and recommendation. If the objections were not filed within 10 days the Appeals Court would not hear an appeal. The objections were mailed certified mail, return receipt requested in a timely manner. The return receipt was signed by an officer of the court indicating the document was received in a timely manner but to this day the document has never been filed. Objection to the hearing of Mitchell's appeal were filed by an assistant attorney general on behalf of Lemuel Shattuck Hospital stating the objections were never filed and the Appeals Court did not have jurisdiction to hear the appeal. The docket sheet from the district court shows many documents were filed weeks from the date the return receipt shows the documents were received. A return receipt filed in the district court shows Dr. Ajeena was properly reserved at his place of abode by a qualified person. Proof of service has been filed with the court but never docketed. This court is requested to review the decision of the lower courts. Examine the proof of service of process and allow Mitchell the defaults against Dr. A. J. Ajeena and Ct Corporation System. Mitchell spoke

personally to Dr. Ajeena at Lemuel Shattuck Hospital and received letters from at least two general agents, also process specialists at CT Corporation System at 2 Oliver Street, Boston, MA 02108, which stated they received service of process of the copies of the summons and complaint. This is a large corporation with offices in several cities in the United States dealing with service of process daily. They are among the nexus of persons and entities involved with each other in this civil action.

For the above reasons a Writ of Certiorari should be grated to this Petitioner.

28 U.S.C. §2403 may apply in this petition.

Respectfully submitted,
By the Petitioner, Pro Se

Thomas Mitchell, Pro Se
One Industries Drive
P.O. Box 146
Norfolk, MA 02056

(2) FILED
00 153 MAY 30 2000
OFFICE OF THE CLERK

No._____

UNITED STATES SUPREME COURT

THOMAS MITCHELL,
PETITIONER

v.

DR. BERNARD KATZ, ET AL.

APPENDIX

63PP

United States Court of Appeals
For the First Circuit

No. 98-2260

THOMAS MITCHELL,
Plaintiff, Appellant,
v.
DR. BERNARD KATZ, ET AL.,
Defendants, Appellees.

Before
Torruella, Chief Judge,
Stahl and Lipez, Circuit Judges

App. 1
JUDGMENT
Entered: December 30, 1999

We have carefully reviewed the record in this case. Essentially for the reasons given by the magistrate judge in his report and recommendation, dated June 24, 1998, the dismissal of all plaintiff's claims is *affirmed.*

By the Court:
PHOEBE D. MORSE, Clerk

JANICE M. O'NEIL
By: _____
Chief Deputy Clerk

Cc: Hon. Judge Nathaniel Gorton, Clerk Anthony Anastas, Messrs. Mitchell, Barton, Waksler, Holliday, Giorlandino, Ms. Ankers White, Ms. Ecker

United States District Court
District of Massachusetts

Thomas Mitchell, Plaintiff, Civil Action
Vs. No. 96-40220-NMG
Dr. Bernard Katz, ET AL., Defendants

App. 2
Report and Recommendation
June 24, 1998

Swartwood, M. J.

Nature of the Proceeding

By orders of reference dated April 4, May 2 and July 2,1997, the following disposition motions have been referred to plaintiff for Findings and Recommendations pursuant to 28 U.S.C. §636 (b) (1)(B):

1. Motion by defendants Bernard Katz, M.D.; Maria Angeles, M.D; ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc.; Correctional Medical Service, Inc.; Correctional Medical Systems, Inc.; ARA Health Services, Inc.; Correctional Medical Systems, Inc.; Michael Pfeiffer; William Leinbach; Richard Miles; and Kevin McGrath (collectively, the "CMSI Defendants") to dismiss the plaintiff's complaint (Docket 20);

2. Motion to dismiss or in the alternative, for Summary Judgment of Defendants Larry Dubois, William Coalter, Nancy White, and Timothy Hall (collectively, the "DOC defendants") (Docket No. 23);

3. Motion of defendants Lemuel Shattuck Hospital and the Goldfarb Ambulatory Care Center to dismiss plaintiff's complaint (collectively, "LSH")[1] (docket No. 33);

4. Motion of Plaintiff for summary judgment against all defendants (docket No. 66). In addition, the following motion for injunctive relief was referred to plaintiff for findings and recommendations by order of reference dated April 4, 1997;

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[1] Goldfarb Ambulatory Care Center is a part of LSH, that is not a separate legal entity. Therefore, all references to LSH shall be deemed to include Goldfarb Ambulatory Care.

5. Plaintiff's motion for T.R.O. Enjoining defendants to render prompt and immediate medical examination, care and treatment to head, and all other injuries received in false imprisonment (Docket No. 4).

Nature of the Case

Plaintiff, Thomas Mitchell ("Mr. Mitchell" or plaintiff"), a person in state custody, has filed a fifty page pro-se complaint asserting various claims against the defendants relating to his imprisonment at MCI-Corcord, an injury which he received while at MCI-Concord, and his subsequent medical care. Mr. Mitchell is proceeding pro se and therefore, I am required to construe his pleadings liberally. See Haines v. Herner, 404 U.S. 519, 520-21, 92 S.Ct. 595-96 (1972); Feliciano v. Dubois, 846 F. Supp. 1033 (D.Mass. 1994). Mr. Mitchell's lengthy complaint is vague and in many parts, incomprehensible. For this reason, the defendants cannot even agree as to what claims Mr. Mitchell is asserting in his complaint. Reading Mr. Mitchell's complaint liberally, I find that plaintiff's complaint seeks relief for the following claims: a state law false imprisonment claim (Count 1); a state law negligence claim (count 2); claims under 42 U.S.C. §1985 for conspiracy to violate his civil rights (count 3); claims under 42 U.S.C. §1983 and Mass. Gen. L.ch. 12, S11 ("MCRA") for violation of his civil rights (counts 4 and 5); a state law claim for conspiracy to deny him adequate medical care (count 6); a state law claim for breach of contract (count 7); violation of the Massachusetts Consumer Protection Act, Mass.Gen.L.ch. 93A ("Chapter 93A") (count 8); and violation of the Racketeer Influenced Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961 et seq. (counts 9 and 10).

Plaintiff's complaint also contains allegations of violations of several federal and state statues which do not create private causes of action. These statues are: 18 U.S.C. § 241 and 242 (conspiracy to deny civil rights) (count 3); 18 U.S.C. S371 (conspiracy) (count 4). See Willing v. Lake Orion Community Schools Bd. Of Trustees, 924 F. Supp. 815 (E.D. Mich. 1996); Fiorino v. Turner, 476 F. Supp. 962, 963 (D. Mass. 1979); 18 U.S.C. S1341 (mail fraud); 18

U.S.C. S1343 (wire fraud), Mass. Gen. Laws. ch. 222 S5 (oath and seal of commissioner); Mass. Gen. Laws. ch. 265 §37 (violation of constitutional rights; punishment); and Mass. Gen. Laws. ch. 268 S6A (false written reports by public officers or employees). Since the plaintiff cannot bring a civil action for violation of these statutes, these claims should be dismissed.

Facts

Facts Relating to Mr. Mitchell's Injury and His Medical Treatment

1. On March 27, 1996, Plaintiff was incarcerated at MCI-Concord.

2. Prior to his incarceration, Mr. Mitchell had heart surgery (a by-pass operation), which included having his sternum cut into two sections. The "sternum cut" had not fully healed at the time the Mr. Mitchell was incarcerated, a fact of which Mr. Mitchell informed one or more of the defendants. Complaint, at ¶¶ 23, 24.

3. On April 17, 1996, while at MCI-Concord Mr. Mitchell slipped and fell on a recently washed and waxed floor.

4. The floor had been washed and waxed by other inmates, on orders by the prison guards. The guards had not posted any signs warning of the slippery condition. Id. at ¶ 25.

5. The plaintiff suffered multiple injuries and remained on the floor for five minutes while prison guards called for medical assistance. Plaintiff heard the prison guards say, "the waxed floor caused him to slop and fall". Id. at ¶ 26.

6. At 10:00 a.m. on April 17, 1997, Dr. Angeles examined the plaintiff and ordered an x-ray of his left wrist. The x-ray revealed that Mr. Mitchell's wrist was broken. Dr. Angeles stated to the plaintiff, "I have no experience in treating this type of injury, so I need to call someone to find out the correct procedures involved in the repair of the broken bone in your wrist." Id. at ¶ 27.

7. After Dr. Angles determined that Mr. Mitchell's wrist was broken, Mr. Mitchell was returned to his cell. At 6:00 p.m., plaintiff returned to the Health Services Unit ("HSU) and a nurse placed a splint and gauze bandages around his wrist. He was then returned to his cell. Id. at ¶28.

8. On April 18, 1996, Plaintiff was suffering from severe pain in his head, chest, shoulders, back, sides, arms and hand. Arrangements were made to take the plaintiff to LSH where he arrived at 10:00 a.m. Dr. Ajeena, an orthopedist at the Goldfarb Ambulatory Care Center within the hospital, examined plaintiff's wrist.

9. The x-rays, which were provided to Dr. Ajeena by someone at MCI-Concord, were labeled "Sharon Mitchell". The x-rays were of a broken left wrist. Dr. Ajeena assumed that these were x-rays of Mr. Mitchell's wrist and treated his wrist.[2]

10. On April 19,1996, plaintiff informed Dr. Angeles that he was in server pain. Dr. Angeles told plaintiff, "I have no medical experience with the type of injuries you are experiencing, therefore, I can't treat you." Id. at ¶32.

11. On April 25, 1996 plaintiff informed the nurse of his extreme pain throughout his body. The nurse diagnosed plaintiff's pain as "muscular pain spasm". Dr. Jaiswal prescribed Tylenol and ordered an electro-cardiogram for the plaintiff. The nurse told Mr. Mitchell that she would schedule an appointment with the doctor for May 9,1996 to have his cast changed and to examine the reasons for his pains. Id. at ¶38.

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[2] In his complaint, Mr. Mitchell conceded that the x-rays were of his wrist, but alleges that Dr. Angeles intentionally mislabeled the x-ray in order to conceal Mr. Mitchell's true name and identity and to cause "False Information to Be Recorded Into 'State Records" At The Prison and Hospital in violation of State Statutory Laws (M.G.L.C. 268, §6A)'". Complaint, at ¶31. This allegation, aside from being speculative and conclusory, fails to support any claim.

12. Plaintiff requested that his wrist be x-rayed, but Dr. Jaiswal and the nurse refused. Id. at ¶¶ 39 and 40.

13. On May 9, 1996, Dr. Ajeena ordered plaintiff's cast removed and examined plaintiff's wrist for three minutes. He then reapplied the cast. Id. at ¶ 42. See Docket No. 101, Section U (Exs. To Pl's Resp. to CMSI's Mot. To dismiss) ("Pl's Exs"). At Ex. 75.[3]

14. On or about May 9, 1996, Plaintiff received a copy of the x-ray report, which essentially showed that his wrist was broken and that there was some soft tissue swelling. Complaint, at ¶ 44.

15. On May 11, 1996, Dr. Angeles ordered Tylenol and that plaintiff undergo an electro-cardiogram. Pls. Exs, at Ex. 79.

16. On May 14, 1996 Dr. Angeles examined the plaintiff and ordered an x-ray of his back and shoulders. Id.

17. On May 24, 1996, Dr. Ajeena removed plaintiff's cast, examined his wrist, applied a bandage to his wrist and hand and scheduled a follow-up appointment for June 28, 1996.

18. On June10, 1996, Dr. Angeles examined the Plaintiff and ordered an x-ray of the plaintiff's ribs.

19. On or about June 14, 1996, and x-ray was taken of the plaintiff's ribs. Dr. Susan Lee's evaluation of those x-rays reads:

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[3] Mr. Mitchell filed a vast number of exhibits consisting of loose papers as part of his response to the defendants' various dispositive motions. This Court's rules require that all papers filed with this court be firmly bound, by staple or other means (excluding rubber bands and paper clips). LR, D. Mass. 5.1. Some of Mr. Mitchell's exhibits were stapled, most where not. Furthermore, Mr. Mitchell failed to include a number of exhibits listed on the Exhibit Index, see (Docket No. 101), at Ex. B. Mr. Mitchell's response could and probably should be stricken for failure to comply with this court's rules, but in order to expedite this matter, I will not take that action at this time.

LEFT RIBS:

This is a limited examination of the left ribs. There is slight deformity in the fourth and fifth lateral ribs on the left, which may represent crush-type fractures. The remainder of the left ribs appear to be grossly intact. Both costophrenic angles are sharp. The heart is not enlarged. Postsurgical changes are superimposed on the mediastinum presumably representing a previous CABG.

CONCLUSION:

a. Limited examination. Probable crush-type fractures at the fourth and fifth lateral ribs on the left.

b. Clear lungs.

PL's. Opp., at Ex. 10.

20. On June 24, 1996, Plaintiff sent a memorandum to the Superintendent of MCI-Concord describing his fall and subsequent Medical care. In each letter, he described the fall as being " due to the improper conduct of another inmate". Plaintiff sent a similar memorandum to a caseworker at MCI-Concord. In those memoranda, Mr. Mitchell also stated that he suffering serious back pain and that he had requested an examination of his back.

21. On or about June 25,1996, Plaintiff's lumbar spine and sacrum were x-rayed. Dr. Eli Etscovitz's report on those x-rays reads:

LUMBAR SPINE:

The bodies are in adequate alignment. There is narrowing of the L5-S1 interspace. No evidence of fracture, dislocation or other bony abnormality.

IMPRESSION: Narrowing at L5-S1 interspace.
SACRUM, TWO VIEWS:

No fracture, dislocation or other bony abnormality. Id.

22. On June 28, 1996, Dr. Ajeena examined the plaintiff, recommending additional therapy for his wrist and a follow-up appointment in two months.

23. In early July, plaintiff was examined by an orthopedic specialist who suggested that he undergo physical therapy. He was also examined by Dr. Angeles who recommended physical therapy and applied an ace bandage to his wrist.

24. On July 11, 1996, a further x-ray was performed on Mr. Mitchell's spine. That x-ray showed that there was no fracture, that there was a "mild thoracic kyphosis" and was otherwise normal. Id.

25. On July 18, 1996 Dr. Angeles examined the plaintiff. Dr. Angeles ordered a cardiology evaluation. Doctor Angeles also noted that Mr. Mitchell provided many additional details of his "fall" in order to assist Dr. Angeles in diagnosing his injuries. Mr. Mitchell told Dr. Angeles that he had not previously disclosed how he had been injured because he did not want to involve other individuals. Id.

26. On July 19, 1996, Elise Daigle, Health Services Administrator at MCI Concord. Id. at Ex. 45. She also indicated that she been given copies of his letters to Mr. Coalter, and Deputy Superintendent Foley and that they had asked her to respond directly to Mr. Mitchell. Ms. Daigle wrote to Mr. Mitchell that she had reviewed his medical records and observed that after he had written his letters, he had been examined on multiple occasions by nurse practitioners and physicians at MCI Concord. She told Mr. Mitchell that she assumed that the concerns raised in his letters had been addressed and told him to contact her directly if he had any other medical concerns. Id.

27. On August 8, 1996. Dr. Jaiswal examined the plaintiff, who requested a referral to a thoracic surgeon. Dr. Jaiswal prescribed Motrin for the plaintiff.

28. On August 13, 1996. Dr. Mohamed examined the plaintiff and ordered that he be restricted to a bottom bunk in his prison cell. Id.

29. On August 22, 1996, Dr. Angeles examined plaintiff's wrist, ordered therapy, and scheduled a follow-up appointment for November, 1996. Id.

30. On September 17, 1996, plaintiff went to LSH for therapy, and medical personnel recommended follow-up therapy and continued use of a heating pad. Id.[4]

Facts Relating to Contract Between CMSI and the DOC

31. On June 28, 1994, the Massachusetts Department of Corrections ("DOC") and ARA Health Services, Inc., d/b/a Correction Medical Systems signed a contract for the latter to render medical services at DOC facilities form July 1, 1994 through June 30, 1997.

32. On February 12, 1996, the DOC and Correction Medical Services, Inc. (formerly, ARA Health Services, Inc., d/b/a Correction Medical Systems) signed an amendment to the contract (as amended, the "Contract") Aff. Of Larry Dubois (Docket No. 25), at Ex. 1.

33. A provision of the contract states that the parties did not intend to confer any rights on third-party beneficiaries.

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[4] For purposes of this Report an Recommendation, I have summarized the history of Mr. Mitchell's treatment since his fall. From April 19, 1996 to September 26, 1996, Plaintiff submitted approximately 110 written Correctional Medical Services Sick Call request forms to the HSU for medical care in connection with the injuries he sustained in his fall. Medical personnel examined or treated plaintiff on over 30 occasions during this same period.

I. The CMSI Defendants' Motion to Dismiss

Correctional Medical Services, Inc. ("CMSI") is under contract with the DOC to provide medical and mental services for inmates in the DOC's correctional facilities, including MCI-Concord. Mr. Mitchell has sued CMSI[5] and various CMSI employees, in their individual and corporate capacities, concerning CMSI's provision of medical care to him and other inmates at the DOC's correctional facilities.

A. Motion to Dismiss of Messrs, Leinbach, McGrath, Miles and Pfeiffer for Lack of Personal Jurisdiction.

1. Standard of Review

Messrs, Leinbach, McGrath, Miles and Pfeiffer move to dismiss plaintiff's claims against them for lack of personal jurisdiction of the grounds that these defendants do not reside in Massachusetts, the plaintiff's injuries did not arise from

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5 Mr. Mitchell has named the following corporate entities as defendants in this suit: ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc.; ARA Health Services, Inc., Correctional Medical Services, Inc.; Correctional Medical Systems, Inc.; ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc. Adrienne Sametz, an officer of CMSI, has submitted a sworn affidavit in which she states that ARA Health Services, Inc. and Correctional Medical Systems, Inc. are prior corporate names of the CMSI and that those entities no longer exist. She further states that Correctional Medical Systems, Inc. changed its name to ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc. in 1986 and that in 1994, ARA Health Services, Inc. changed its name to CMSI. Additionally, there never has been an entity named Correctional Medical Services, Inc. or Correctional Medical Systems, Inc.; ARA Health Services, Inc. d/b/a Correctional Medical Systems, Inc. See CMSI defs' Mem. of Law in Sup. of their mot. To dismiss the Pl's complaint (Docket No. 21) ("CMSI's Mem.") at Ex. 3. CMSI argues that in order to simplify this matter, the nonexistent corporate entities should be dismissed. Mr. Mitchell does not oppose this motion (although he reserves his right to reinstate any such entity as a party in this case should it become clear that any of these entities does in fact exist). Therefore, I am recommending that the following entities be dismissed from this case: ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc.; ARA Health Services, Inc.; Correctional Medical Systems, Inc.; and Correctional Medical Systems, Inc., ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc.

any actions of these defendants and these defendants do not have sufficient contacts with Massachusetts to warrant this court exercising jurisdiction over them.

There are two different bases upon which a court may exercise personal jurisdiction over a defendant: general jurisdiction and specific jurisdiction. "General jurisdiction exists when the litigation is not directly founded on the defendant's forum base contacts, but the defendant has nevertheless engaged in continuous and systematic activity, unrelated to the suit, in the forum state." Foster-Miller, Inc. v. Babcock & Wilcox Canada, 46 F.3d 138, 145 (1st Cir. 1995) (quoting United Elec. Workers v. 163 Pleasant St. Corp., 960 F.2d 1080, 1088 (1st Cir. 1992)). In this case, none of these defendants has sufficient contacts with Massachusetts to warrant the "invocation of general jurisdiction". Id. Where general jurisdiction is lacking, the court must focus on specific jurisdiction:

As the label implies, this focus requires weighing the legal sufficiency of a specific set of interactions as a basis for personal jurisdiction... The existence of specific personal jurisdiction depends upon the plaintiff's ability to satisfy two cornerstone conditions: 'first, that the forum in which the federal district court sits has a long-arm statute that purports to grant jurisdiction over the defendant; and second, that the exercise of jurisdiction pursuant to that statute comports with the strictures of the Constitution.'[6]

When a defendant challenges the court's jurisdiction over him/her, the plaintiff has the burden of establishing the existence of personal jurisdiction. Ealing Corp. v. Harrods Ltd., 790 F.2d 978, 979 (1st Cir. 1986); accord McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). To defeat a motion to dismiss for lack of personal jurisdiction, the plaintiff must establish sufficient facts to support a prima facie case authorizing personal jurisdiction over the defendant. U.S.S Yachts, Inc. v. Ocean Yachts, Inc., 894 F.2d 9, 11 (1st Cir. 1990). The plaintiff may not rest upon unsupported allegations in the pleadings and make a

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[6] This test is applied in both federal question and diversity jurisdiction cases. See Digital Equip. Corp., 960 F. supp.456, 462 n. 14 (D.Mass. 1997).

showing of jurisdiction but "must go beyond the pleadings and make affirmative proof". Boit v. Gar-Tec Products, Inc., 967 F.2d 671, 675 (1st Cir. 1992); Chlebda v. H.E. Fortna & Bro. Inc., 609 F.2d 1022, 1024 (1st Cir. 1979) (believing that jurisdictional allegations must be taken as true is an "elementary mistake"). However, the court will accept properly supported proffers of evidence by the plaintiff as true. Boit, 967 F.2d at 675. In addition, the court will consider affidavits of the moving defendants and will view any disputed facts in the light most favorable to the plaintiff. Sawtelle v. Farrell, 70 F.3d 1381, 1385 (1st Cir. 1995).

Initially, I will examine whether this court's assertion of personal jurisdiction over these defendants is authorized under the Massachusetts long-arm statute. I will then examine whether this court's exercise of jurisdiction over these defendants comports with due process.

2. Facts Relating to Jurisdiction

a) Mr. Leinbach resides in Arizona and has never resided in Massachusetts. Mr. Leinbach does not presently, nor has he ever owned any property or assets in Massachusetts. He is a former area vice president of CMSI whose last day of employment was November 30, 1994. He was a principal participant in the contract negotiations between CMSI and the DOC. See CMSI's Mem., at Ex. 4 (Leinbach Affidavit). Mr. Leinbach is being sued as a "contractual party". Complaint, at ¶12. However, Mr. Leinbach did not sign the Contract.

b) Mr. McGrath resides in New York. He is a former program director with CMSI and his last day of employment was November 30, 1994. From July, 1994 through November, 1994, Mr. McGrath administered the contract. During this period, Mr. McGrath worked in Massachusetts. However, Mr. McGrath has never resided in Massachusetts and does not presently, nor has he ever owned any property or assets in Massachusetts. CMSI's Mem. at Ex. 5 (McGrath Affidavit). He is being sued as a "principal party" to the contract. Complaint, at ¶21c.

c) Mr. Miles resides in Missouri and is the president of CMSI. Mr. Miles had no involvement in the negotiation of

the contract and he did not sign the contract. He is not, and has not been involved in the day to day handling and implementation of CMSI's contractual duties with respect to the contract. Mr. Miles has never resided in Massachusetts and does not presently, nor has he ever owned any property or assets in Massachusetts. CMSI's Mem. at Ex. 6 (McGrath Affidavit).

d) Mr. Pfeiffer resides in Missouri. He is the executive vice president of CMSI. Mr. Pfeiffer signed the original contract and the amendment on behalf of CMSI, but was not involved in the contract negotiation. Mr. Pfeiffer is not involved in the day to day handling of CMSI's contractual duties with the DOC. Mr. Pfeiffer has never resided in Massachusetts and does not presently, nor has he ever owned any property or assets in Massachusetts. CMSI's Mem. at Ex. 7 (Pfeiffer Affidavit). Mr. Pfeiffer is being sued as a principal party to the contract. Complaint, at ¶11.

e) The Contract contains a forum-selection provision, which requires all claims arising under the contract to be filed in the state or federal courts of Massachusetts.

f) Messrs. Leinbach and Mr. McGrath are listed in the Contract as persons to receive notice of matters relating to the contract.

g) None of these defendants have ever had any contact, communications or involvement of any sort with Mr. Mitchell. See CMSI's Mem., at Exs. 4-7. All of the allegations against these defendants are based solely on the fact that they were either signatories to the contract and/or employees of CMSI. Mr. Mitchell does not allege that any of these defendants were active participants in decisions concerning his medical treatment.[7]

3. Discussion

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[7] The CMSI defendants filed affidavits in support of their motion to dismiss for lack of personal jurisdiction. Although the plaintiff did not submit affidavits relevant to the issue of personal jurisdiction, and therefore, made no proffer of evidence to establish jurisdiction, courts will perform the jurisdictional analysis solely o the basis of the affidavits of the moving defendants. See Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980) (plaintiff's failure to counter defendants' affidavits with respect to jurisdiction renders the facts within defendants' affidavits controlling).

a) The Forum Selection Clause

The contract contains a choice of law provision requiring all claims arising under the contract to be filed in the state or federal courts within Massachusetts. Parties to an agreement, which contains a forum selection clause, can be said to have waived their right to challenge the designated forum's jurisdiction over them. In general, officers and other employees of a corporation are not bound by a choice of law provision contained in a contract to which such individual is not a party. In this case, Mr. Leinbach negotiated and Mr. Pfeiffer signed the initial contract between CMSI and the DOC and Mr. Pfeiffer signed the amendment. However, it is clear that Mr. Pfeiffer signed the contract as an employee for CMSI and not individually and that Mr. Leinbach did not sign the contract in any capacity. Furthermore, none of the other individual CMSI defendants signed the contract in any capacity. Under these circumstances, the forum selection clause does not confer jurisdiction over these defendants. However, as to Mr. Leinbach and Mr. Pfeiffer, the court can consider whether the fact that the contract which they negotiated and/or signed (on CMSI's behalf) contains a forum selection clause tends to establish that these defendants availed themselves of the protection of the laws of Massachusetts.

b) Application of the Massachusetts Long-Arm Statute

The Massachusetts long-arm statue provides in relevant part as follows:

A court may exercise personal jurisdiction over a person, who acts directly or by agent, as to a cause of action in law or equity arising from the person's

1. Transacting any business in this commonwealth;
2. Contracting to supply services or things in this commonwealth;
3. Causing tortuous injury by an act or omission in this commonwealth;
4. Causing tortuous injury in this commonwealth by an act or omission outside in this commonwealth if he

regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth; or

5. Having an interest in, using or possessing real property in this commonwealth.

Mass. Gen. Laws ch. 223A §3 (1996).

It is not clear which provision of the Massachusetts long-are statute Mr. Mitchell is invoking as a basis for this court's exercise of personal jurisdiction over these defendants. In his affidavit in support of his request that this court retain jurisdiction and that the acts of these defendants sufficiently relate to the harm complained of by him to warrant the exercise of jurisdiction. In other word, plaintiff simply states that under the applicable legal standards, this court has jurisdiction over these defendants. However, the plaintiff fails to assert facts, which would support this legal conclusion. Furthermore, while in his affidavit plaintiff seems to suggest that §§ 3(c) or (d) of the Massachusetts long-arm statute (it is not clear which provision he is invoking) confer personal jurisdiction, his claims against these defendants focus on their role in the administration of the contract. Therefore, I assume that plaintiff also may be seeking to invoke jurisdiction pursuant to § 3(a) of the long-arm statute, which provides for jurisdiction over persons "transacting any business in [Massachusetts]", and/or section 3 (b) which provides for jurisdiction over persons who "contract [] to supply services or things in [Massachusetts]". Because plaintiff is proceeding pro se, I will examine all possibilities.

In analyzing whether the Massachusetts long-arm statue confers jurisdiction over these defendants, I must consider that a court may not exercise jurisdiction over a corporate officer solely on the basis of his/her employment by the corporation or the title held by such officer. In order for the court to exercise personal jurisdiction over that individual s/he must have "direct personal involvement in some decision or action which is causally related to plaintiff's injury". Charles River Data Sty. V. Oracle

Complex Sys., 788 F. Supp. 54, 57 (D. Mass. 1991) (quoting Escude Cruz, 619 F.2d at 907).

First, I will address Mr. Mitchell's assertion that the Massachusetts long-arm statute confer jurisdiction over these defendants because their tortuous actions/inactions denied him adequate medical treatment.

Mr. Mitchell has failed to allege any facts, which would establish that any of these defendants were active participants in decisions concerning his medical treatment at the time of his injury and related medical problems. These defendants, on the other hand, have submitted sworn affidavits which establish (i) that with the exception of Mr. McGrath, none of them have ever been involved with the administration and/or implementation of the contract, and (ii) none of them have been involved, directly or indirectly, with the provision of medical care to Mr. Mitchell. In fact, Messrs, Leinbach and McGrath had left CMSI over sixteen months prior to Mr. Mitchell's accident, and over fifteen months prior to his being incarcerated at MCI-Concord. Therefore, I do not find that §§ 3(c) or 3 (d) of the Massachusetts long-arm statue confers jurisdiction over these defendants. I will now examine whether the Massachusetts long-arm statue confers jurisdiction over these defendants because they have transacted business in Massachusetts, or because they contracted to provide services in Massachusetts.

Messrs, Leinbach, Miles, and Pfeiffer have never resided in Massachusetts and have not played any role in the administration of the contract. However, Messrs. Leinbach, Miles, and Pfeiffer have never resided in Massachusetts and have not played any role in the administration of the Contract. However, Mr. Leinbach was a principal participant in the contract negotiations between CMSI and the DOC and Mr. McGrath was the initial administrator of the Contract for CMSI and he lived in Massachusetts for approximately three and one-half months. Federal and state courts interpret the "'transacting any business' language of the statute in a generous manner." United Elec. Workers, 960 F.2d at 1087. The business transacted by the defendant need not take place within the Commonwealth. Bond Leather Co. v. O.T. Shoe Mfg. Co., 764 F.2d 928, 932 (1st Cir. 1985)(citing Good

Hope Industries, Inc. v. Ryder Scott Co., 378 Mass. 1, 10; 389 N.E.2d 76 (1979)). Furthermore,

> Since the extent of a nonresident's involvement ... is properly relevant to the constitutional, and not the statutory, dimension of the jurisdiction inquiry"Id., even somewhat exiguous acts on a defendant's part can, at times, suffice to satisfy the long-arm statute's threshold for transacting business.

United Elec. Workers, 960 F.2d at 1087 (internal citation omitted). Applying these standards, I find that even under the broadest reading of the Massachusetts long-arm statute, it cannot be said that Messrs. Miles, and Pfeiffer transacted business in Massachusetts. For this reason, Plaintiff's claims against these Defendants should be dismissed for lack of personal jurisdiction. As to Messrs. Leinbach and McGrath, I cannot find as a matter of law that Mr. Mitchell has failed to establish a prima facie case that they have transacted business in Massachusetts. For this reason, I will assume that as to these Defendants, the Massachusetts long-arm statute confers jurisdiction. Nevertheless, I must still determine whether this Court's exercise of jurisdiction over these Defendants would comport with due process. Furthermore, although I have found that Mr. Mitchell's claims against that Messrs. Miles, and Pfeiffer should be dismissed because Mr. Mitchell has failed to establish a prima facie case that jurisdiction is warranted under the Massachusetts long-arm statute, for the sake of completeness, I will examine whether this Court's exercise of personal jurisdiction over them would comport with due process.

c. Whether Jurisdiction Over Mr. Leinbach, Mr. McGrath, and Mr. Pfeiffer Comports with Due Process

In order to determine whether this Court's exercise of personal jurisdiction over a defendant comports with due process, this Court must apply the following three-part test:

First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's forum-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the

benefits and protections of that state's laws and making the defendant's involuntary presence before the state's court foreseeable. Third, the exercise of jurisdiction must, in light of the Gestalt factors[8], be reasonable.

Nowak v. Tak How Investments, Ltd., 94 F.2d 708, 712-13 (1st Cir. 1996)(quoting Pritzker v. Yari, 42F.3d 53, 60-61(1st Cir. 1994)). The first two parts of the test go to the issue of whether the defendant has minimum contacts with the forum. The third part of the test determines whether the court's exercise of personal jurisdiction of the defendant "comports with traditional notions of 'fair play and substantial justice.'" Id. At 717(quoting International Shoe Co. v. Washington, 326 U.S. 310, 320(1945)).

In order to determine whether a plaintiff's claims "arise out of, or relate to, the defendant's forum state activities," at least in tort context, the court applies a proximate cause standard. Nowak, 94 F.3d at 715("proximate or legal cause clearly distinguishes between foreseeable and un foreseeable risks of harm. Foreseeability is a crucial component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also conforms to the relatedness prong"). Id. However, in a contract or business relationship context, the First Circuit has stated that "the absence of proximate cause per se should not always render the exercise of specific jurisdiction unconstitutional." Id. In the contract /business relationship, the first circuit has found that where a defendant directly targets residents of a state "and achieves its purpose, it may not necessarily be unreasonable to subject that corporation to forum jurisdiction when the efforts lead to a tortuous result. The [defendant's] own conduct increases the likelihood that a specific resident will respond favorably. If the resident is harmed while engaged in activities integral to the relationship

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[8] The "gestalt factors" are: "(1) the defendant's burden of appearing, (2) the forum state's interest in adjudicating the dispute, (3) the plaintiff's interest in obtaining convenient and effective relief, (4) the judicial system's interest in obtaining the most effective resolution of the controversy, and (5) the common interests of all sovereigns in promoting substantive social policies." Nowak v. Tak How Investments, Ltd., 94 F.3d 708, 717 (1st Cir. 1996) (citation to the quoted case omitted).

the corporation sought to establish, we think the nexus between the contacts and the cause of the action is sufficiently strong to survive the due process inquiry at least the relationship stage". Id. The First Circuit describes this standard for determining whether the relationship test has been met as a combination of the "but for"[9] and proximate cause standards.

In this case, plaintiff's claims against these defendants arise out of the alleged contractual relationship between CMSI and the DOC. Mr. Mitchell asserts that these defendants have breached the contract by failing to provide adequate medical treatment to inmates and they have violated the civil RICO statute by conspiring with others to withhold medical treatment from inmates. Therefore, under the First Circuit's reasoning in Nowak, this court should apply a combination of the "but for" and proximate cause standards.

Messrs. Leinbach and McGrath

Neither Mr. Leinbach nor Mr. McGrath has ever resided in Massachusetts. Mr. Leinbach negotiated the original contract and for a brief period, Mr. McGrath administered the contract (during which time he lived in Massachusetts). However, Messrs. McGrath and Leinbach left CMSI's emply in November 1994, more than fifteen months prior to Mr. Mitchell's incarceration. Furthermore, the contract was substantially modified in February 1996, one month prior to Mr. Mitchell's incarceration. Under these circumstances, Mr. Mitchell's claims against Messrs. McGrath and Leinbach cannot be said to arise of out of their activities in Massachusetts. For this reason, this court's exercise of jurisdiction over any of these defendants would not comport with due process.

Messrs, Miles and Pfeiffer

Messrs, Miles and Pfeiffer are currently employed by CMSI. Mr. Miles is the president of CMSI and Mr. Pfeiffer is an executive vice president. Mr. Pfeiffer signed the original contract and the 1996 amendment to that contract on

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[9] The injury at issue would not have occurred "but for" the forum-state contacts.

behalf of CMSI. However, neither of these defendants has ever resided in Massachusetts, neither was involved in the negotiation of the contact and neither has ever been involved in the day to day handling and implementation of CMSI's duties under the contract. Mr. Pfeiffer's signing of the contract was simply a ministerial act, which could have been performed by any executive officer of CMSI. It cannot be said that no contractual relationship would have arisen between CMSI and the DOC had Mr. Pfeiffer not signed the contract on CMSI's behalf. Under these circumstances, I find that Mr. Mitchell has failed to make a prima facie showing that the relatedness prong of the due process inquiry has been met. Mr. Mitchell has failed to establish that his claims against these defendants arise out of any activities of these defendants directly or indirectly related to Massachusetts. Therefore, I find that this court's exercise of jurisdiction over these two defendants would not comport with due process.

For the reasons set forth above, I find that Messrs, Leinbach, McGrath, Miles and Pfeiffer should be dismissed from this case for lack of personal jurisdiction.[10]

b) Mr. Katz's Motion to Dismiss

Defendant, Bernard Katz, M.D. seeks to dismiss the claims against him on the grounds that he is misidentified in the complaint and is an improper defendant.

1. Facts Concerning Dr. Katz

e. Mr. Mitchell is suing Dr. Katz individually and in his capacity "as the Administrative Medical Doctor-Agent" of CMSI. Mr. Mitchell alleges that Dr. Katz has the responsibility of enforcing the contractual agreement between CMSI and the DOC and that he is responsible "for the good care and

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[10] These defendants also seek to dismiss the claims against them on the grounds that they were not served in accordance with this court's rules. First, since it is clear that these defendants have received notice of this action, I would not be inclined to recommend that the claims against them be dismissed on this ground. Second, since I have recommended that the claims against them be dismissed for lack of personal jurisdiction, it is not necessary for me to address this issue.

treatment of [his] medical care and need". Complaint, at ¶¶ 6, 31.

f. The only specific allegations which Mr. Mitchell makes against Dr. Katz are the following:

1. Plaintiff alleges that Dr. Katz has conspired with others to deny him prompt medical care. Id. at ¶¶ 49, 59.

2. In support of his civil RICO claim, Mr. Mitchell alleges that Dr. Katz and others "performed acts in joint enterprise... to deny [him] the [sic.] prompt and professional medical care and treatment on April 17, 1996".

g. Dr. Katz is employed by CMSI as Psychiatrist in chief of the Massachusetts Prison System and is the medical director at Bridgewater State Hospital.

h. Dr. Katz is not and has never been responsible for enforcing the contract. CMSI's Mem. at Ex. 8 (Katz Affidavit).

i. Dr. Katz's only responsibilities under the contract are to supervise the mental health services provided to inmates. Id.

j. Dr. Katz has never met, examined or treated the plaintiff. Id.

k. To Dr. Katz's knowledge, Mr. Mitchell has never requested any mental health services while an inmate at a DOC facility. Id.

Mr. Mitchell as submitted an opposition to Dr. Katz's motion to dismiss for failure to state any claims against him. See docket No. 101, at section K (Pls.' Opp. To Def's Summary of Grounds) ("Pl's. Opp. To Def's Summ."). In this opposition, Mr. Mitchell states that while at MCI Gardner, he was sent to the Mental Health Division of CMSI to be tested to find out if he had any mental problems and for memory testing. Id. at ¶ 9. Mr. Mitchell was tested and the progress notes issued thereafter indicated that he did not meet the criteria for mental health services. Pl's. Ex., 1. The progress notes indicate that Mr. Mitchell was examined by Mental Health Service "Dir G Kon [sic.], and CMS Mental Health Service Dir Carol Cesario (among others)". Id. In his

opposition, Mr. Mitchell asserts that he was told by John McClintock that the determination that he did not meet the criteria of mental health services was made by his supervisors. Plaintiff then makes the inference that because Mental Health Services is headed by Dr. Katz, that Dr. Katz was involved in the decision. Pl's. Opp. To Def's Summ., at ¶10. Mr. McClintock's notes indicate that he told Mr. Mitchell that Director Kone would discuss with him that no further mental health evaluation would be conducted. Pl's. Ex. at Ex. 1a. On this record, I find, for the reasons set forth below, that Mr. Mitchell has failed to state a claim against Dr. Katz.

First, in his complaint, Mr. Mitchell seeks damages for injuries suffered in connection with a fall at MCI-Concord. For purposes of this motion, I will assume that his allegations are broad enough to include mental health matters, which he raised while at NCCI-Gardner. Second, Mr. Mitchell has attempted in his memorandum to raise an issue of fact as to whether Dr. Katz took part in decisions concerning his mental health. However, Mr. Mitchell did not make those allegations in a signed, sworn affidavit, but rather made them in an unsworn memorandum. Therefore, those allegations will not be considered by this court. Third, even if I were to consider these allegations, they are based on speculation and inference and do not raise a genuine issue of material fact as to whether Dr. Katz had any role in Mr. Mitchell's medical care and the administration of the contract. For this reason, plaintiff's claims against Dr. Katz in his individual capacity should be dismissed.

In his opposition, Dr. Katz asserts that he is suing Mr. Katz in his supervisory capacity. An individual acting in a supervisory capacity cannot be held vicariously liable under §1983 on a respondent superior theory. However, such individual may be liable "on the basis of his own acts or omissions." Maldonado-Denis v. Castillo-Rodriquez, No. 93-2012, 1994 WL 162113, at 3 (1st Cir. May 6, 1994). In order for Mr. Mitchell to prevail in a cause of action under §1983 against Dr. Katz, he must prove that Dr. Katz acted either intentionally or demonstrated a deliberate indifference to the deprivation of his constitutional rights. See Manarite

v. City of Springfield, 957 F.2d 953, 955 (1st Cir. 1992). Supervisor's may be liable under §1983 for formulating policies or customs that result in the "challenged occurrence" and therefore, "even if a supervisor lacks actual knowledge of censurable conduct, he may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness and if he had the power and authority to alleviate it." Maldonado-Denis, 1994 WL 162113, at 3. Additionally, the complaining party must prove a causal connection between the challenged occurrence and the supervisor's conduct. In Maldonado-Denis, the First Circuit stated that the complaining party must:

> Affirmatively connect the supervisor's conduct to the subordinate's violative act or omission... for example, a sufficient casual [sic] nexus may be found if the supervisor knew of, overtly or tacitly approved of, or purposely disregarded the conduct....
>
> A causal link may also be forged if there exists a known history of widespread abuse sufficient to alert a supervisor to ongoing violations. When the supervisor is on notice and fails to take corrective action, say by better training or closer oversight, liability may attach.
>
> ...isolated instances of unconstitutional activity ordinarily are insufficient to establish a supervisor's policy or custom, or otherwise to show deliberate indifference... proof of mere negligence, without more, is inadequate to ground supervisory liability. Gross negligence can signify deliberate indifference and serve as a basis for supervisory deliberate indifference and serve as a basis for supervisory liability if it is causally connected to the actions that work the direct constitutional injury.

Id. at 4 (citations omitted).

Mr. Mitchell has not alleged any facts which would establish that any policy or custom put in place by Dr. Katz led to a deprivation of his rights, or that Dr. Katz had knowledge of widespread abuses within Mental Health Services which led to a deprivation of his constitutional rights. In fact, I do not find that Mr. Mitchell has alleged any facts, which would establish that anyone at Mental Health Services failed to adequately address his medical needs. Therefore, Mr. Mitchell has failed to allege any facts, which would establish claims against Dr. Katz in his supervisory capacity.

On the record before me, I find as a matter of law that Mr. Mitchell has failed to state sufficient facts to allege any claims against Dr. Katz. For this reason, Dr. Katz's motion to dismiss should be allowed.

1. The CMSI Defendants' Motion to Dismiss for Failure to State a Claim[11]

CMSI seeks to dismiss Mr. Mitchell's claims against it on the grounds that, as to each claim, he has failed to state a cause of action.

1. Standard of Review

A motion to dismiss for failure to state a claim under rule 12 (b)(6) will be granted only if the plaintiff would be unable to recover under any set of facts. Gonzalez-Bernal v. United States, 907 F.2d 246, 248 (1st Cir. 1990). In ruling on such a motion, this court is obligated to accept all the facts alleged in the complaint as true and draw reasonable inferences in favor of the non-moving party (in this case the plaintiff). Feinstein v. Resolution Trust Corp., 942 F.2d 34, 37 (1st Cir. 1991).

2. Plaintiff's false imprisonment Claim

Mr. Mitchell has made general allegations that he has been falsely imprisoned, which I will address in greater detail in connection with the DOC defendants' motion to dismiss.

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[11] Although for various reasons I have recommended that Mr. Mitchell's claims against the individual CMSI defendants be dismissed, for purposes of this discussion, I will assume that they are defendants and address whether Mr. Mitchell has stated claims against them.

Simply put, any false imprisonment claims against the CMSI defendants are specious, frivolous and without basis in law. Therefore, to the extent that Mr. Mitchell has asserted a claim for false imprisonment against any CMSI defendant, that claim should be dismissed.

3. Plaintiff's Civil RICO Claim

Mr. Mitchell has asserted civil RICO claims against all of the CMSI defendants. Specifically, Mr. Mitchell has asserted that these defendants participated in an ongoing enterprise (with the DOC defendants) "to deny [him] ... PROMPT, PROFESSIONAL and ADEQUATE MEDICAL CARE and TREATMENT" during his incarceration. Complaint, at ¶70. In other words, Mr. Mitchell is asserting RICO claims against these defendants for personal injuries, which he suffered as a result of these defendants failure to provide him adequate medical care. Mr. Mitchell also asserts that as a result of the CMSI defendants' actions, CMSI has increased its profits, which has resulted in financial harm to Massachusetts's taxpayers.

First, I will address the CMSI defendants' assertion that Mr. Mitchell lacks standing to assert a civil RICO claim. If Mr. Mitchell lacks standing to assert a civil RICO claim, then this court lacks jurisdiction to consider the merits of such claims. Libertad v. Welch, 53 F.3d 428, 436 (1st Cir. 1995). There are three constitutional elements of standing: that the plaintiff has suffered an actual injury; that there be a causal connection between the plaintiff's injury and the conduct complained of; and that it is likely that the injury will be redressed by a favorable decision. In addition, the claims asserted by the plaintiff must be "within the zone of interests protected by the law invoked"; the plaintiff must be asserting his own rights; and the plaintiff cannot seek to have the court adjudicate "abstract questions of wide public significance which amount to generalized grievances more appropriately addressed by the legislature". Id. In the context of a civil RICO claim, "a RICO plaintiff seeking to invoke a court's jurisdiction must ... establish that [he] has been injured in [his] business or property by the conduct allegedly constituting the RICI violation". Id.

Mr. Mitchell seeks to recover for harm he has incurred as a result of the inadequate medical care, which he has received while incarcerated at MCI-Concord. It is clear that injuries of the type asserted by Mr. Mitchell are "personal injuries" and not injuries to his business or property within the meaning of the statute. See Oscar v. University Students Co-Operative Assoc., 965 F.2d 783 (9th Cir. 1992) (en banc) (clear that personal injuries not compensable under RICO); Gentry v. Resolution Trust Corp., 937 F.2d 899 (personal injuries not recoverable under RICO); Drake v. B.F. Goodrich Co., 782 F.2d 638 (6th Cir. 1986) (damages for physical injury and wrongful death no recoverable under RICO); Moore v. Eli Lilly and Co., 626 F. Supp. 365 (D. Mass. 1986) (injuries to person are not sufficient to maintain RICO action).

Mr. Mitchell further asserts a claim on behalf of Massachusetts taxpayers claiming that the CMSI defendants and the DOC defendants have defrauded the taxpayers by failing to perform the contract in accordance with its terms. First, Mr. Mitchell does not have standing to assert claims on behalf of other persons. See United States v. Little Joe Trawlers, Inc., 780 F.2d 158, 161 (it is well settled under standing doctrine that party may not assert legal rights or others). However, since Mr. Mitchell is proceeding pro se, I will assume that he is attempting to state a claim on his own behalf in his capacity as a taxpayer. In order to have standing to state a RICO claim in his capacity as a Massachusetts taxpayer, Mr. Mitchell must allege an injury to his business or property. It is not sufficient to allege that the defendants have profited from their conduct. In the context of this case, in order to state a claim for injury to his business or property, Mr. Mitchell would at a minimum have to assert that as a result of the defendants' fraudulent scheme to increase their profits under the contract, Massachusetts taxes have increased, i.e., he has had to pay additional taxes. Mr. Mitchell does not make any such claim, Furthermore, even if Mr. Mitchell were to allege that his taxes have increased, precedent suggests that he would not have standing to assert his claim. In this case, any injury suffered by Mr. Mitchell as a taxpayer would derive from the state's injury and more

specifically, the DOC. Taxpayers do not have the right to sue on behalf of the state or its agencies. See Carter v. Berger, 777 F.2d 1173 (7th Cir. 1985). In this case, assuming Mr. Mitchell's assertions are true, only the state or the DOC would have the right to assert a civil RICO claim.

For the reasons set forth above, Mr. Mitchell does not have standing to assert a civil RICO claim against the CMSI defendants and therefore, this claim should be dismissed. Since Mr. Mitchell does not have standing to assert a RICO claim, it would be futile to permit him to amend his complaint with respect to this claim. Therefore, his RICO claim should be dismissed with prejudice.

4. Breach of Contract

Plaintiff claims that CMSI breached its contract with DOC by failing to give him adequate medical care.[12] Under Massachusetts's law, a third party can maintain an action for breach of contact only if he or she is an intended beneficiary of the contract. Rae v. Air Speed, Inc., 386 Mass. 187, 195 (1982). The intent of the parties determines whether a third party is an intended beneficiary. Markel Service Ins. Agency, Inc. v. Tifco, Inc., 403 Mass. 401, 405 (1988). Furthermore, a third party is an intended beneficiary of a contract if he or she could reasonably rely on the terms of the contract as conferring on him/her a right to enforce the contract. Rae , 386 Mass. At 195 n. 3.

Read liberally, plaintiff's complaint alleges that CMSI contracted with the DOC to provide medical care to state prisoners and the CMSI breached its obligations under the contract. However, plaintiff fails to allege that it was the intention of the parties to confer a right to enforce the contract upon inmates of DOC facilities or any other third parties. On the contrary, Paragraph VI (G) of the original contract and Paragraph XVI of the amendment, expressly preclude third parties from asserting rights under the contract:

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[12] None of the individual CMSI defendants is a party to the contract with the DOC. To the extent that Mr. Mitchell is attempting to state breach of contract claim against these defendants, his claim is meritless.

Third Party Beneficiaries

Nothing contained in this agreement is intended or shall be construed to evidence an intent to confer any rights or remedies upon any person other than the parties hereto and their respective agents and representatives.

Therefore, plaintiff is nothing more than an incidental beneficiary of the contract. Incidental beneficiaries cannot sue to enforce a contract or bring an action for damages under a contract.

For the reasons set forth above, plaintiff fails to state a claim against any CMSI defendant for breach of contract.

5. Plaintiff's Chapter 93A Claim

Any person injured as the result of another's use of unfair trade practices may bring a civil claim for relief under the Massachusetts Consumer Protection Act, Chapter 93A. At least 30 days prior to filing a claim, a plaintiff must mail or deliver to any prospective defendant a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered. Mass. Gen. L. ch. 93A, § 9 (3). The purpose of the notice requirement is to give the parties an opportunity to negotiate a settlement prior to suit. Entrialgo v. Twin City Dodge, Inc., 368 Mass. 812, 813 (1975). Failure to allege the mailing or delivery of such a letter requires dismissal of the claim. Slaney v. Westwood Auto, Inc., 366 Mass. 688, 704 (1975). The CMSI defendants argue that plaintiff failed to allege that he complied with Chapter 93A's notice requirement.

Plaintiff's complaint alleges that he prepared claim letters pursuant to chapter 93A. Complaint, at ¶ 74. Since plaintiff has failed to allege that he mailed or delivered such letters, a condition precedent to the filing of a Chapter 93A claim, his Chapter 93A claim should be dismissed.

For the reasons set forth above, Mr. Mitchell's claims against Mr. Leinbach, Mr. McGrath, Mr. Pfeiffer, Mr. Miles, Dr. Katz and ARA Health Services, Inc. d/b/a Correctional Medical Systems Inc., Correctional Medical Services, Inc. and Correctional Medical System, Inc. should be dismissed.

Furthermore, Counts 1, 7, 8, 9 and 10 should be dismissed as to CMSI and Dr. Angeles.[13]

II. Plaintiff's Claims Against the DOC Defendants

Mr. Mitchell has asserted against the DOC defendants claims for violation of 42 U.S.C. § 1983 (federal civil rights claim), for violation of 42 U.S.C. § 1985 (conspiracy to violate civil rights), for violation of the RICO statute, and state law claims for violation of the MCRA, negligence, false imprisonment, conspiracy to deprive him of adequate medical care, breach of contract and violation of Chapter 93A. Plaintiff has sued the DOC defendants in their official and individual capacities. The DOC defendants have filed a motion to dismiss, or in the alternative for summary judgment.

A. Plaintiff's Federal Claims Against the DOC Defendants

1. Whether Plaintiff's Federal Claims Against the DOC Defendants in Their Official Capacities Should be Dismissed.

The DOC defendants argue that plaintiff's claims against them in their official capacities are barred by the doctrine of sovereign immunity.

It is well settled that claims for damages against state officials in their official capacities are treated as suits against the state. Forte v. Sullivan, F.2d 1, 2, n. 2 (1st Cir. 1991); Kentucky v. Graham, 473 U.S 159, 169 (1985). The Eleventh Amendment bars a private party from bringing

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[13] In their motion to dismiss, the CMSI defendants seek to dismiss all claims as to Messrs. Katz, Leinbach, McGrath, Miles and Pfeiffer. Furthermore, CMSI and Dr. Angeles seek dismissal of Counts 1, 4, 6, 7, 8 and 9. The CMSI defendants claim, count 6 of plaintiff's complaint as constituting a claim for ongoing interstate denial of medical care while under false imprisonment and do not interpret the complaint as asserting a count 10. I have interpreted count 4 of Mr. Michell's complaint as stating a civil rights claim, count 6 as stating a cause of action for conspiracy to deny him adequate medical care and I have determined that Mr. Mitchell has asserted a civil RICO claim against the CMSI Defendants in Count 10 of his complaint. I have addressed the civil RICO claims asserted against the CMSI defendants in count 10 of Mr. Mitchell's complaint in connection with their motion to dismiss count 9. I will address whether Mr. Mitchell has stated claims for civil conspiracy, negligence, or violation of federal and state civil rights against CMSI and Dr. Angeles in connection with Mr. Mitchell's motion for summary judgment.

damages claims against congress, when enacting the relevant legislation, clearly stripped states of their immunity. See generally Hess v. Port Authority Trans-Hudson Corp., 513 U.S. 30, 39 (1994). First, the Commonwealth has not consented to suit in this action. Second, with respect to § 1983 and civil RICO actions, congress did not strip states of their right RICO actions, congress did not strip states of their right to sovereign immunity and therefore, neither states, nor their agents acting in their official capacity are subject to suit under those statutes. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1988) ("neither a state nor its officials acting in their official capacities are 'persons' under § 1983"); Gaines v. Texas Tech Univ., 956 F. Supp. 886 (N.D.Tex. 1997) (RICO claims against state officials in their official capacities are barred by Eleventh Amendment). Likewise, Congress has not stripped states of their immunity from suit under §1985. See Parents for Qual. Educ. V. Ft. Wayne Comm. Schools, 662 F. Supp. 1475, 1480 (N.D.Ind. 1987) (and citations therin).

For the reasons set forth above, plaintiff's §1983, §1985 and RICO claims for monetary damages against the DOC defendants in their official capacities, should be dismissed.

2. Whether Plaintiff's Federal Claims Against the DOC Defendants in Their Individual Capacities Should be Dismissed.

a. Plaintiff's Section 1983 Claim.

The DOC defendants assert that plaintiff's section 1983 claims against them in their individual capacities should be dismissed for failure to state a claim and/or on the grounds that they are entitled to qualified immunity. I will first address whether Mr. Mitchell has stated a claim against the DOC defendants in their individual capacities.

i. Mr. Mitchell's Claims Against the DOC Defendants in Their Supervisory Capacities

Mr. Mitchell has asserted that the DOC Defendants violated his civil rights under Section 1983 by denying him his constitutional right to adequate medical care.

"Every person who, under color of my statute ... of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." 42 U.S.C. § 1983. Mr. Mitchell does not allege that the DOC Defendants, other than Mr. Coalter, personally acted to deprive him of his constitutional right to adequate medical care, rather he alleges that each of the Defendants is responsible for overseeing the health and welfare of the inmates incarcerated at MCI Concord and/or DOC correctional facilities in general and, therefore, each Defendant is responsible for actions of the medical staff and/or other correctional facility employees which deprived him of his constitutional right to adequate medical care.

I have previously discussed the law applicable to a Section 1983 claim against an individual in his/her supervisory capacity in connection with my discussion concerning Mr. Mitchell's claims against Dr. Katz. Applying the same analysis, I find that Mr. Mitchell has failed to allege any facts which would establish that any policy or custom put into place by any of the DOC Defendants led to a deprivation of his rights, or that any of these Defendants had knowledge of widespread abuses within MCI Concord's Medical Health Service which led to a deprivation of his constitutional rights. For this reason, Mr. Mitchell's Section 1983 claims against Ms. White and Messrs. Hall and DuBois in their individual capacities should be dismissed.

ii. Mr. Mitchell's Claims Against Mr. Coalter

As to Mr. Coalter, Plaintiff asserts facts which read liberally, attempt to state a direct claim against Mr. Coalter for deprivation of his rights as a result of Mr. Coalter's failure to ensure that he receive adequate medical care. Specifically, Mr. Mitchell states that on August 20, 1996 he did not notify Mr. Coalter that he was experiencing chest pains. Complaint, at ¶72 and Ex. 4. Mr. Mitchell also wrote to Mr. Coalter on June 30, 1996. Coalter Aff. (Docket No.

26), at Ex. 1. Mr. Coalter referred such correspondence to the appropriate medical personnel. Id. at ¶¶2,3.

Upon receipt of Mr. Mitchell's correspondence, Mr. Coalter promptly contacted Ms. Daigle, the Health Service's Administrator, and requested that she reply to Mr. Mitchell's Complaint. Thereafter, Mr. Coalter received a copy of Ms. Daigle's letter to Mr. Mitchell in which she addressed the issues Mr. Mitchell had raised with Mr. Coalter. Under the circumstances, I find that as a matter of law, Mr. Mitchell has failed to allege sufficient facts to establish that Mr. Coalter was deliberately indifferent to his medical needs. For this reason, Mr. Mitchell's Section 1983 claim against Mr. Coalter should be dismissed.

Although I have determined that Mr. Mitchell has failed to state a § 1983 claim against any of the DOC Defendants in their individual capacities, for the sake of completeness, I will discuss the merits of Mr. Mitchell's §1983 claim for deliberate indifference to his serious medical needs.

iii. The Merits of Mr. Mitchell's Section 1983 Claim

"It is undisputed that the treatment a prisoner receivers in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Helling v. McKinney, 509 U.S. 25 (1993). Deliberate indifference to a prisoner's serious medical needs may be a violation of the Eighth Amendment. Estelle v. Gambel, 429 U.S. 97, 104 (1976). However, this does not mean that a prisoner need only claim that he has not received adequate medical treatment to establish that his Eighth Amendment rights have been violated. Id. On the contrary, "courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment." Watson v. Caton, 984 F2d 537, 540 (1st Cir. 1993). In order to prove deliberated indifference, the inmate must prove that the challenged occurrence was more than a case of simple negligence or medical malpractice on the part of medical personnel. For

example, an inmate can prove "deliberate indifference" by showing that he has been denied medical treatment as a punishment, or that medical personnel at the prison have made "wanton' decisions to deny or delay care". Id. at 540.

The deliberate indifference standard embodies both an objective and a subjective prong. First, the alleged deprivation must be, in objective terms, sufficiently serious'. Second, the charged official must act with a sufficiently culpable state of mind... a prison official does not act in a deliberately indifferent manner unless that official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'

Hathaway v. Coughlin, 37 F.3d 63, 66, (2d Cir. 1994) (internal citations omitted) (quoting Farmer v. Brennan, --- U.S. --, 114 S. Ct. 1970 (1994)). For purposes of this order and report and recommendation, I will assume that the plaintiff has established that he has serious medical needs.

In general, plaintiff's claims amount to nothing more than a difference of opinion between he and the medical staff as to how to best treat his medical needs, which is not sufficient to establish deliberate indifference to his medical needs. Therefore, I find that plaintiff has failed to state a claim under section 1983.

Since I have found that Mr. Mitchell has failed to state a § 1983 claim against any of the DOC defendants in their individual capacities, it is not necessary for me to address whether these defendants are entitled to qualified immunity.

b. Plaintiff's Section 1985 Claim

Plaintiff asserts that the DOC defendants have conspired to violate his right and the rights of other inmates to adequate medical care. Section 1985 allows persons who have been deprived of certain rights or privileges to recover damages from persons who have conspired to interfere with those rights or privileges.

Section 1985 (3) provides in pertinent part, as follows:

If two or more persons in any state or territory conspire... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws...[and] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby, another is injured in his person or property, or deprived or having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

In order for Mr. Mitchell to state a § 1985 claim a against any of the DOC defendants, he must establish each of the following five elements:

i) First, that such individuals were involved in a conspiracy, that is, that they had an agreement with one or more persons;

ii) Second, that the purpose, or part of the purpose, of the conspiracy was to deprive the plaintiff of his federally protected rights;

iii) Third, that the actions of the individual DOC defendants were motivated, in whole or in part, by a disliking or hateful discriminatory attitude toward a specific class of people;

iv) Fourth, that the defendants knew or thought that the plaintiff was a member of that class; and

v) Fifth, that the conspiracy caused the injury or deprivation of the plaintiff's constitutionally protected rights.

In this case, Mr. Mitchell has alleged that he is senior citizen. However, he has not alleged that the DOC defendants actions were motivated, in whole or in part, by their dislike of persons on the basis of their age. Rather, reading his complaint liberally, he asserts that the DOC defendants have conspired with other persons to deprive him of his constitutional right to adequate medical care in order to save money. Because Mr. Mitchell has failed to allege that the DOC defendants "had a class-based discriminatory animus", he has failed to state a claim under section 1985 (3). Roach v. City of Evansville, 111 F.3d 544 (7th Cir. 1997).

Therefore, plaintiff's section 1985 claim against the DOC defendants in their individual capacities should be dismissed.

c. Mr. Mitchell's Civil RICO Claim

Mr. Mitchell civil RICO claims asserted against the DOC defendants in their individual capacities should be dismissed for the same reasons that I have recommended dismissal of his civil RICO claims against the CMSI defendants.

B. Plaintiff's State Law Claims

1. Whether Mr. Mitchell's State Law Claims Against the DOC Defendants in Their Official Capacities Should Be Dismissed.

The DOC Defendants, in their official capacities, have asserted that Mr. Mitchell's state law claims against them should be dismissed on sovereign immunity grounds.

As stated previously, the Eleventh Amendment bars a private party from bringing damages claims against a state in federal court unless the state has consent to suit. The Commonwealth has not waived its sovereign immunity under the MCRA or Chapter 93A. Commonwealth v. ELM Medical Lab., Inc., 33 Mass. App. Ct. 71, 76 (1992) (state not person under MCRA); Estate of Janowicz v. Massachusetts State Lottery Comm., 2 Mass. L. Rep. 607(Mass. Sup. Ct. 1994). Furthermore, under the Eleventh Amendment, The Commonwealth is clearly immune from suit in federal court for breach of contract and for state tort claims. See Mass. Gen. L. 258, §3 (which provides that state superior court has exclusive jurisdiction over tort claims against Commonwealth); see also Hayes v. Town of Orleans, 39 Mass. App. Ct. 682 (1996) (recognizing that SJC has held that Section 3 of Chapter 258 evidences legislature's intent for the Commonwealth to retain its sovereign immunity in federal court for claims brought pursuant to Massachusetts Tort Claims Act)[14]. Therefore, Mr. Mitchell's state law claims against the DOC Defendants in their official capacities should be dismissed.

2. Whether Mr. Mitchell's MCRA Claim Against the DOC Defendants in Their Capacities Should Be Dismissed.

[14] Additionally, the Commonwealth is not subject to suit for intentional torts such as false imprisonment and conspiracy. See Mass. Gen. L. ch 258, §2.

The Massachusetts Supreme Judicial Court has held that claims under the MCRA are to be analyzed in the same manner as Section 1983 claims, except that in order to recover under the MCRA, the plaintiff: (1) does not have to establish state action and (2) must show that the defendant(s) interfered with his/her rights secured by the constitution or laws of the United States or Massachusetts by means of threats, intimidation or coercion. See Layne v. Superintendent, MCI Cedar Junction, 406 Mass. 136 (1989); Batchelder v. Allied Stores Corp., 393 Mass. 819 (1985). Therefore, if this Court finds that Plaintiff has failed to state a cause of action under Section 1983 with respect to any of his claims, then any corresponding MCRA claims must also be dismissed. I have already determined that Mr. Mitchell has failed to state a Section 1983 claim against these Defendants in their individual capacities and therefore, Mr. Mitchell's MCRA claim against them in their individual capacities should also be dismissed. Furthermore, Mr. Mitchell has failed to allege that these defendants interfered with his rights by means of threats, intimidation or coercion. For this additional reason, he has failed to state a claim against them under the MCRA.

For the reasons set forth above, Mr. Mitchell's claims under the MCRA against the DOC defendants in their individual capacities should be dismissed.

3. Mr. Mitchell's State Law Tort Claims

Mr. Mitchell has alleged state law tort claims against the DOC defendants in their individual capacities for negligence, false imprisonment and conspiracy to deny him adequate medical care. The DOC defendants seek to dismiss these claims on the grounds that they are not subject to suit for negligence under the Massachusetts State Tort Claims Act and the plaintiff has failed to state a claim for false imprisonment and civil conspiracy.

1. Whether Plaintiff's Negligence Claim against the DOC Defendants in Their Individual Capacities must be Dismissed.

Under Mass. Gen. L. ch 258 §2, public employees, such as the DOC defendants are immune from personal liability while acting in the scope of their duties if such

employee's conduct is alleged to constitute negligence (whether simple, ordinary or gross negligence). McNamara v. Honeyman, 406 Mass. 43 (1989). In this case, it is uncontroverted that the DOC defendants are public employees and that Mr. Mitchell has asserted claims against them for negligence for acts or omissions by them during the scope of their employment. Since the DOC defendants are immune from suit for negligence claims against them in their individual capacities, as to these defendants, Count 2 of Mr. Mitchell's complaint should be dismissed.

2. Whether Mr. Mitchell's False Imprisonment Claim Against the Individual DOC Defendants Should be Dismissed.

Plaintiff's false imprisonment claim is asserted against Messrs, DuBois and Coalter. In support of this claim, plaintiff alleges that when he was initially incarcerated, Mr. DuBois and Mr. Coalter did not receive a properly authenticated warrant of commitment or the sentencing transcripts (because they were not delivered by the clerk of the trail court); the trial judge failed to issue the warrant under his personal signature; the clerk of trial court failed to affix the wafer seals of authentication to the warrant, the 'charging instrument' and the sentencing transcripts; and he was imprisoned at MCI-Concord despite the fact that the warrant stated that he was to be placed in MCI-Cedar Junction. In Massachusetts, the tort of false imprisonment consists of "the (1) intentional and (2) unlawful (3) confinement of a person, (4) directly or indirectly, (5) of which the person confined is conscious or is harmed by such confinement". Noel v. Town of Plymouth, Mass., 895 F. Supp. 346, 354 (D. Mass. 1995). The First Circuit has repeatedly held, albeit in unpublished opinions, that the issues raised by Mr. Mitchell do not render his imprisonment unlawful. For this reason, Mr. Mitchell's allegations do not support a claim for false imprisonment and therefore, Count 1 of his complaint should be dismissed as to the DOC defendants in their individual capacities.

3. Whether Mr. Mitchell's Civil Conspiracy Claim Should be Dismissed.

Massachusetts law recognizes two distinct causes of action for civil conspiracy. First, Massachusetts recognizes civil conspiracy "of a coercive type" for which a "plaintiff must allege that defendants, acting in unison, have some peculiar power of coercion over the plaintiff that they would not have had if they had been acting independently." Aetna Case. Surety Co. v. P&B Autobody, 43 F.3d 1546, 1563 (1st Cir. 1994); see also Kurker v. Hill, 44 Mass. App. Ct. 184, 188 (1998). Court 6 of Mr. Mitchell's complaint fails to allege any facts, which would support such a claim. Massachusetts also recognizes the more traditional civil conspiracy cause of action based on vicarious liability for "concerted action". Aetna Case., 43 F.3d at 1564. In order to prove such a claim, a plaintiff must allege the existence of a "common design or an agreement, although not necessarily express, between two or more persons to do a wrongful act and; second, proof of some tortuous act in furtherance of the agreement". Id. Reading plaintiff's complaint, liberally, I have assumed that in Count 6 of his complaint he is attempting to state a claim against Drs. Katz and Angeles, and Messrs. Coalter and DuBois for conspiracy to deny him adequate medical care. In Count 6 Mr. Mitchell states that these defendants "conspired to discriminate against him". Complaint, at ¶ 59. This conclusory allegation is simply insufficient to establish that these defendants had a common design or agreement. I find that even under the most liberal reading, Mr. Mitchell fails to allege sufficient facts to support a claim for civil conspiracy. Therefore, Mr. Mitchell's civil conspiracy claim against the DOC defendants in their individual capacities should be dismissed.

4. Mr. Mitchell's Claims Against the DOC Defendants for Breach of Contact and Violation of Chapter 93A.

   a) Whether Mr. Mitchell's Breach of Contract Claim Should be Dismissed.

Mr. Mitchell has asserted a claim for breach of contract against all of the DOC defendants. Messrs, Coalter and Hall and Ms. White are not signatories to the contract. Mr. DuBois signed the contract on behalf of the DOC, in his capacity as Commissioner of Corrections. Since none of these defendants are parties to the contract, Mr. Mitchell's

claims against them are meritless. Furthermore, I have already found that the parties to the contract did not intend to confer rights on any third party beneficiaries (See my discussion of the CMSI defendants' motion for summary judgment on Mr. Mitchell's breach of contract claim, supra) and therefore, Mr. Mitchell cannot assert a claim for breach of contract. For these reasons, Mr. Mitchell has failed to state a claim against the DOC defendants in their individual capacities for breach of contract.

b) Whether Mr. Mitchell's Chapter 93A Claim Should be Dismissed.

Assuming for purposes of this discussion that the DOC defendants were engaged in the "conduct of any trade or commerce", Mr. Mitchell's Chapter 93A claim against them should be dismissed for the same reason that I recommended the Mr. Mitchell's Chapter 93A claim against the CMSI defendants should be dismissed, that is, he failed to allege that he served a written demand for relief on these defendants as required. Therefore, Mr. Mitchell's Chapter 93A claim against these defendants in their individual capacities should be dismissed.

For the reasons set forth above, the DOC defendants motion to dismiss, or in the alternative for summary judgment, should be allowed.

III. LSH's Motion To Dismiss

LSH seeks to dismiss Mr. Mitchell's claims against it on the grounds that it is not subject to suit under §1983 or RICO. In making this argument, LSH interprets the complaint as asserting claims against it for violation of §1983 and RICO. However, in his complaint, Mr. Mitchell asserts that LSH is being sued "as defendants [sic.] in joint-enterprise related as CONTRACTUAL-PARTIES". Complaint, at ¶ 19. The only factual allegations against LSD contained in the complaint are asserted in support of plaintiff's breach of contract claim (Count 7) and his RICO claims (Counts 9 and 10). In addition, Mr. Mitchell asserts in his Chapter 93A claim (Count 8), that all defendants have engaged in deceptive acts and practices, which have caused him injury. Therefore, for purposes of this motion to dismiss, I will

assume that Mr. Mitchell has alleged federal claims against LSH for violation of Section 1983 and civil RICO, and state law claims for breach of contract and violation of Chapter 93A.

A. Mr. Mitchell's Federal Claims.

Mr. Mitchell has asserted claims against LSH under Section 1983 for violations of his constitutional right to adequate medical care and under the civil RICO statute. LSH is a facility of the Massachusetts Department of Health, that is, it is an instrumentality of the state. Therefore, under the Eleventh Amendment, LSH is immune from suit for monetary damages in federal court. See Burke v. Medfield State Hosp., Civ.A.No. 87-2321-MA, 1988 WL 22486 (D.Mass. 1988)(Medfield State Hospital immune from suit in federal court under Eleventh Amendment); see also this Court's discussion of sovereign immunity, *supra*.

B. State Law Claims.

Mr. Mitchell has asserted a state law breach of contract claim against LSH for failure to provide him with adequate medical care in accordance with the terms of the Contract. Furthermore, I have already found that Mr. Mitchell is not an intended beneficiary under the Contract and therefore, cannot sue under the Contract. See my discussion of Mr. Mitchell's breach of contract claim against the CMSI Defendants, *supra*. For these reasons, Mr. Mitchell's claim for breach of contract against LSH is totally devoid of merit. With respect to Mr. Mitchell's Chapter 93A claim against LSH, Mr. Mitchell has failed to allege that he sent LSH the required statutory notice and therefore, this claim should be dismissed.

For the reasons set forth above LSH's motion to dismiss should be allowed.

Whether Mr. Mitchell's Claims Against CT Corporation Should Be Dismissed.

CT Corporation is named as the resident agent for service of the process in Massachusetts for CMSI. Because CT Corporation is CMSI's resident agent, Mr. Mitchell has named CT Corporation as a Defendant in this case. By Order dated March 19, 1998, I found that Mr. Mitchell has failed to properly serve CT Corporation. From the record, it is clear that Mr. Mitchell has made no further effort to serve CT

Corporation and therefore, in accordance with Fed.R.Civ.P. 4(m), this Court should sua sponte dismiss Mr. Mitchell's claims against CT Corporation, without prejudice.

Plaintiff's Motion for Summary Judgement

The Plaintiff has filed a motion for summary judgment. I have recommended that the DOC Defendants' motion to dismiss or in the alternative for summary judgment and LSH's motion to dismiss be allowed, and that all claims asserted against Dr. Katz, William Leinbach, Richard Miles, Kevin McGrath and Michael G. Pfeiffer be dismissed. Furthermore, I have recommended that CMSI's and Dr. Angeles' motion to dismiss as to Counts 1,7,8, 9 & 10 be allowed. As to all of these claims, Mr. Mitchell's motion for summary judgment should be denied. Therefore, the only claims remaining in this action as to which Mr. Mitchell may seek summary judgment are the following claims asserted against Dr. Angeles and CMSI: a state law claim for negligence (Count 2); federal and state civil rights claims (Counts 3-5); and a state civil law conspiracy claim (Count 6). Furthermore, although CMSI and Dr. Angeles have not filed any dispositive motions as to these claims, this Court May enter judgment in their favor, so long as Mr. Mitchell had an opportunity to present all of his evidence concerning CMSI and Dr. Angeles on these claims to this Court. Since each of the other Defendants (other than CT Corporation, which was never served properly) have filed dispositive motions as to all of Mr. Mitchell's claims and since Mr. Mitchell has filed comprehensive oppositions to those motions and in addition, has filed a comprehensive motion for summary judgment, I find that he has had the opportunity to present all of his evidence against all Defendants for all of his claims. See McGuinness v. DuBois, 891 F. Supp. 25 33n. 6 (D.Mass. 1985) (court may sua sponte grant summary judgement against moving party so long as moving party had opportunity to come forward with evidence); Andrews v. Dubois, 888 F. Supp. 213, 220 (D. Mass. 1995).

A. Mr. Mitchell's Federal and State Civil Rights Claims

Mr. Mitchell has filed a §1983 claim, a §1985 claim and a claim under the MCRA against CMSI and Dr. Angeles.

For the same reason that I have found that Mr. Mitchell failed to state a cause of action as to such claims against the DOC defendants in their individual capacities, I find that he has failed to state a cause of action against CMSI and Dr. Angeles.

As to Mr. Mitchell's negligence claim against CMSI and Dr. Angeles, it is clear from the record that Mr. Mitchell adamantly disagrees with the medical treatment he received while incarcerated at MCI-Concord. However, he has failed to establish that there is a genuine issue of material fact as to whether these defendants were negligent in treating his medical needs. On the contrary, Mr. Mitchell submitted numerous sick call request forms and thereafter, medical personnel saw him within a reasonable time after submitting such form. Furthermore, Dr. Angeles ordered numerous x-rays and tests to address Mr. Mitchell's medical complaints. In the record, Mr. Mitchell has submitted copies of pages from medical textbooks claiming that he suffers injuries to various parts of his body pictured therein. First, these pictures are clearly not pictures of Mr. Mitchell and his attempts to use them to illustrate the injuries he has suffered as a result of these defendants' negligence undercuts the credibility of his allegations. Second, he has failed to establish that he is suffering any adverse medical consequences as a result of the care he received while at MCI-Concord. On the record before me, I find that Mr. Mitchell has failed to assert sufficient facts to create a genuine issue of material fact as to whether CMSI and/or Dr. Angeles was negligent.

For the reasons set forth above, summary judgement should enter for CMSI and Dr. Angeles on Mr. Mitchell's civil conspiracy and negligence claims.

VI. Plaintiff's Motion for a Temporary Restraining Order

Plaintiff request that this court enter a temporary restraining order requiring the defendants to bring him to Lahey Clinic for a full medical examination[15]. A temporary restraining order may be granted only when a plaintiff

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[15] The Eleventh Amendment does not bar a person from seeking injunctive relief in federal court against a state official in his /her official capacity.

demonstrates 1) a substantial likelihood of success on the merits, 2) irreparable injury will result in the absence of the request relief, 3) no other parties will be harmed if temporary relief is granted, and 4) the public interest favors entry of a temporary restraining order. Natural Resources Defense Council v. E.P.A, 806 F. Supp. 275 (D.D.C. 1992) (citing Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). I have recommended, for various reasons, that all of plaintiff's claims against all of the defendants be dismissed or that summary judgement enter against him. Since the plaintiff has failed to demonstrate any likelihood of success in this action, this motion should be denied.

Conclusion

I recommend that:

1. The Motion by Defendants Bernard Katz; Maria Angeles; ARA Health Services, Inc., d/b/a Correction Medical Systems, Inc.; Correctional Medical Services, Inc.; Correctional Medical Service Inc.; Correction Medical Systems, Inc.; ARA Health Services, Inc. d/b/a Correction Medical Systems, Inc.; Michael Pfeiffer; William Leinbach; Richard Miles; and Kevin McGrath to dismiss the plaintiff's complaint (Docket No. 20) be allowed as follows: Mr. Mitchell's claims against Dr. Katz and Messrs. Pfeiffer, Leinbach, Miles and McGrath be dismissed in their entirety and the counts 1, 7, 8, 9, 10 of his complaint be dismissed as to CMSI and Dr. Angeles[16];
2. The motion to dismiss, or in the alternative, for summary judgement of defendants Larry DuBois, William Coalter, Nancy White, and Timothy Hall (Docket No. 23) be allowed;
3. The motion of defendants Lemuel Shattuck Hospital and the Goldfarb Ambulatory Care Center to dismiss plaintiff's complaint (Docket No. 33) be allowed;

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[16] ARA Health Services, Inc., Correctional Medical Systems, Inc., Correctional Medical Systems, Inc., Correctional Medical Service, Inc. and Correctional Medical Systems, Inc., ARA Health Services, Inc. d/b/a Correctional Medical Systems, Inc. should be dismissed because they do not exist. See note 6, supra.

4. The motion of plaintiff for summary judgement (Docket No. 66) be denied and that summary judgement enter for CMSI and Dr. Angeles on Counts 2, 3, 4, 5 & 6 of Mr. Mitchell's complaint;
5. That CT Corporation be dismissed without prejudice sua sponta for plaintiff's failure to effect proper service; and
6. The plaintiff's motion for T.R.O. Enjoining Defendants to Render prompt and immediate medical examination, care and treatment to head, and all other injuries received in false imprisonment (Docket No. 4) be denied.

United States Court of Appeals
For the First Circuit

No. 98-2260

THOMAS MITCHELL,
Plaintiff, Appellant,
v.
DR. BERNARD KATZ, ET AL.,
Defendants, Appellees.

Before
Torruella, Chief Judge,
Stahl and Lipez, Circuit Judges

App. 3
ORDER OF COURT
Entered: February 28, 2000

Petitioner's request for a rehearing of the order of this court, dated December 30, 1999, is *denied.*

By the Court:

PHOEBE MORSE
Clerk

Cc: Messrs. Mitchell, Giorlandino, Waksler, and Holliday

App. 4

§ 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R.S. §1979; Dec. 29, 1979, P.L. 96-170, §1,93 Stat. 1284.)

App. 5

Notice to the Parties

The parties are advised that under the provisions of Rule 3(b) of the rules for United States Magistrates in the United States District Court for the district of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection there to with the Clerk of this Court within 10 days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this circuit has indicated that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court's order entered pursuant to this report and recommendation. See United States v. Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Scott v. Schewiker, 702 F.2d 13, 14 (1st Cir. 1983); Untied States v. Vega, 678 F2d 376, 378-379 (1st Cir. 1980); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980). See also, Thomas v. Arn, 474 U.S. 140, 106 S. Ct. 466, 88 L.Ed. 2d 435 (1985).

Charles B. Swartwood, III
Magistrate Judge

Rule 5, Federal Rules of Civil Procedure

(b) **Proof of Service**

(1) Except as otherwise provided by the Federal Rules of Civil Procedure, proof of service of all pleadings and other papers required to be served (except discovery papers that in accordance with Rule 33-36(f) are not to be filed) shall be filed in the office of the clerk promptly after service has been made. The proof shall show the time and manner of service, and may be made by written acknowledgment of service, a certificate of a member of the bar of this court, or an affidavit of the person who served the paper.

(2) A certificate of service of a member of the bar shall appear at the bottom of or on the margin of the last page of the paper to which it relates. The certificate shall be a brief, single-spaced statement and may be in the following form:

> I hereby certify that a true copy of the above document was served upon (each party appearing pro se and) the attorney of record for each other party by mail (by hand) on (date). (Signature)

On or after the effective date of these local rules, documents not conforming to the requirements of this rule (except notices of appeal) shall be returned by the clerk.

(3) Failure to make proof of service does not affect the validity of the service.

App. 6

Cooperation in Litigation

The Commonwealth of Massachusetts, the Executive Office of Public Safety, the Office of the Attorney General, the Agency or any other division, office or agency of the Commonwealth, shall not be responsible for representing or defending the provider. Personnel, or any other employee, agent or subcontractor of the provider named as a defendant in any lawsuit, or in connection with a tort claim brought pursuant to G.L. c. 258. The provider shall not be responsible for defending the Commonwealth, the Executive Office of Public Safety, or any other division, office or agency o f the Commonwealth, the agency or any Commonwealth officer or employee named as a defendant in a lawsuit. The agency and the provider agree to make all reasonable efforts to cooperated with each other in the defense of any litigation brought by any person not party to this agreement, including suits that concern services, the program, or this agreement.

The provider and personnel shall appear at court civil commitment hearings; petitions for discharge from Bridgewater State Hospital, competency and substituted judgment hearings, guardianship hearings , petitions to compel inmates to receive life sustaining medications and / or procedures and such civil litigation matters as are deemed appropriate by the Associate Commissioner for Health Services and the Program Director on a case by case basis.

The provider shall submit quarterly litigation reports to the Associate Commissioner for Health Services, providing the following detail for all civil litigation concerning services, the program or this agreement, in which the provider or any personnel are parties: (i) the case name and docket number; (ii) the names of the plaintiff(s) and defendant(s); (iii) the names and addresses of all counsel appearing; (iv) the nature of the claim; and (v) the status of the case.

The provisions of this section III(F) shall survive the expiration or termination of this agreement.

Obligations of the Provider

Services to be Provided: In General

The provider shall provide medical, mental health and forensic mental health services to all inmates, male and female, adult and minor, residing in facilities or committed to the care and custody of the Department of Correction. Medical services shall include all types of medical, dental, laboratory, pharmaceutical, hospitalization/ inpatient care which shall include primary, secondary, and tertiary levels outpatient/medical clinic are, physician specially and all other medical type services. The provider will provide all services in compliance with all applicable federal and state standards, standards of the ACA, NCCHC, the Massachusetts Board of Public Health, the regulations of Massachusetts Board of Registration in Medicine at 243 CMR, and health services policies of the agency at 103 DOC 600, et.sec...

The provider shall be solely responsible for making all decisions with respect to the type, timing and level of services needed by inmates covered by the program, including without limitation, the determination of whether an inmate is in need of clinic care, hospitalization, admission to a clinic, referral to an outside specialist or otherwise needs specialized care. Except as herein otherwise provider shall be the sole supplier and/or coordinator of all medical, mental health, forensic mental health and dental programs constituting services under this agreement, and , as implementation, modification and continuation of any and all health care programs constituting services for inmates. Any health and dental programs required by expansion or addition shall be provided by mutual written agreement of the parties and appropriate monetary and other adjustments in this agreement shall be made.

App. 8

Nurses, legislators rip prison-services firm

By George Snell
Telegram & Gazette Staff

Leominster – Problem are pilling up for correctional Medical Services, the company that provides medical services to state inmates.

Nurse went public yesterday with their charges that CMS allows unsafe working conditions to exist, forces employees to work overtime and has blocked efforts by employees to form a labor union.

"I'm more frightened by executives at CMS than I am of the inmates I deal with everyday," a CMS registered nurse said.

CMS a private company, has a $15-million-a-year contract with the state Department of Correction to provide medical services to more than 11,000 inmates serving time in state prisons.

The nurses' accusations come of the heels of a revelation last week some CMS workers Gardner State Prison were suspended for timecard abuses.

Ken Fields, a CMS spokesman, called the time-card abuses at Gardner an " isolated incident."

Fields could not be reached yesterday for comment about the complaints lodged by nurses.

The latest accusations are being taken seriously by a delegation of area legislators, including state Rep Mary Jane Simmons, D-Leominster, Harold P. Naughton Jr., D-Clinton, and state Sen. Pamela P. Resor, D-Acton.

About 20 CMS nurses from state prisons in Lancaster, Shirley, Gardner and Bridgewater joined with the state legislators yesterday at a news conference to condemn CMS.

"What I hear is being done to you, I've prosecuted people for," state Rep. Harold P. Naughton Jr., a former assistant district attorney, said. "These people at CMS are nothing more than gangsters."

The legislators signed a letter addressed to Department of Correction Commissioner Michael Maloney, calling for an investigation of CMS.

"In meeting with these people (CMS employees), we have listened to stories of intimidation, threats of benefit reduction or loss, and forced attendance at presentations of CMS during work hours," the letter said in part.

Simmons organized the news conference, held at the Gallagher Building, after she was inundated with complaints from constituents who work for CMS.

One 31-year-old registered nurse, who asked not to be identified, said she often works in a common room with more than 40 inmates at the Souza-Baranowski Correction Center in Shirley, with a lone prison guard to protect her.

"There is a real lack of security, What is one guard going to do it trouble breaks out? I feel like I'm all alone," she said.

The nurses complained of severe shortages in employees and medicine. The nurses said they are overworked and often have to provide second-rate care to inmates because CMS does not provide them with adequate medical supplies.

Nurses said the working conditions led them to ask for the Service Employees International Union, Local 285, to step in and help them back in November.

Nurses at the news conference said CMS executives have tried to prevent the union from forming by threatening employees with cuts in pay and benefits, forcing on-the-job seminars about the dangers of unions, and verbally intimidating employees.

The accusations are under investigation by the National Labor Relations, Simmons said.

"I'm not going to stand for taxpayer dollars being used to subsidize this type of behavior," Simmons said. "I want the commissioner to make a serious investigation into these allegations."

The letter to Maloney also demanded CMS refrain form anti-union activities.

December 5, 1996

Thomas Mitchell
NCCI PO Box 466
Gardner, MA 01440

Re: Thomas Mitchell v. Dr. Bennard Katz, et al
Case Number 96-40220

Dear Mr. Mitchell:

We are returning the enclosed documents pertaining to the above-entitled action. You have indicated several corporate entities upon which you intend to make service.

Since you only forwarded one set of documents, we are unable to determine for which corporation process is intended. Please note that it is not the responsibility of the registered agent to make copies of documents received in our office. We merely take and forward to the intended recipient, documents directed to the individual companies for which CT Corporation System furnishes the registered agent.

We request that you indicate which entity you wish to serve through CT. The documents should be addressed to the exact name of the company you wish to serve, c/o CT Corporation system at the address shown on this letter.

Truly Yours,

Michelle Larkin
Process Specialist

Cc: United States District Court of MA

Thomas Mitchell
N.C.C.I
P.O. Box 466
Gardner, MA 01440
December 7, 1996

Michelle Larkin
Process Specialist
CT Corporation System
2 Oliver Street
Boston, MA 02109

Re: Thomas Mitchell v. Dr. Bernard Katz, et al,
U.S. District Court-MASS.
Docket No.96-40220

Dear Ms. Larkin:

I am in receipt and possession of your parcel of Legal Documents, of which I had completed my service upon you as required by Federal Rules of Civil Procedures. I served you with the copy of the complaint and summons as I was instructed by the clerk of court to do, since I am suing you as one of the defendants in the above-entitled civil action.

Attached hereto please find a copy of the PRINT_OUT from the state's secretary of the Commonwealth of Massachusetts, Corporation Division-Corporation Master-Display, relating to Correctional Medical Service, Inc., depicting C.T. Corporation System, with additional and "Agent/Clerk".

Therefore, [your] actions of returning my complaint with you "cover-letter" stating erroneously, asserting that "Agent/Clerk" as defendant, is in and of itself, an error.

Be advised, that [you] are the [Defendant] being the "Clerk", as per the law, states. I am returning your complaint and summons, and your [20] days commenced at the time of deliverance previously acceptance of my certified U.S. mail Ret.Rec.Req dated-signed on PS form 3811 #P461 274 11.

Respectfully submitted,
Enclosures/ attachments
Thomas Mitchell

March 10, 1997

Thomas Mitchell
P.O. Box 466
Gardner, MA 01440

Re: Thomas Mitchell v. Dr. Bernard Katz, et al
Case No. 96-40220-NMG

Dear Mr. Mitchell:

We are herewith returning the documents, which we received regarding the above captioned matter.

In order that we may properly process the enclosed document we must be provided with the full corporate name of the company for which it is intended.

Should you make this determination, please note the full name of the company on the envelope, return the documents to us and we will be glad to forward it on.

Thank you for your cooperation.

Valerie Johnson
Process Specialist

Cc: In the United States District Court for the District of Massachusetts

June 2, 1998
Mr. Thomas Mitchell
PO Box 466
Gardner, MA 01440-0466

Dear Mr. Mitchell:

This responds to your inquiry regarding the delivery of certified correspondence to a number of individuals throughout the country. Certified mail service provides the sender with a record of a delivery through the return receipts, PS Form 3811 for your letters, that is the proof of delivery you paid for. In the event you did not receive signed form 3811 you paid for at the time of mailing , you may obtain a duplicate return receipt through your local post office by presenting your original mailing receipt and completing a PS Form 3811A, request for duplicate return receipt.

There is no additional proof of delivery available for this service. In the event you mailed these letters without a return receipt service, a copy of the actual delivery receipt may be obtained for a fee of $6.60 per letter for proof of delivery after mailing.

Postal employees must be at least 18-years of age in order to be considered for employment. In regards to your inquiry regarding competency, the Postal Service cannot comment on the competence or lack of competence of any customer receiving mail. Mail is delivered as addressed to individuals known to be receiving mail at a delivery address. Certified mail, unless restricted through payment of an additional restricted delivery fee, is delivered to any individual who normally receives mail at a delivery address.

I regret I am able to supply any additional information in this matter.

Sincerely,
James J. Reardon

App. 13

Rule 55 Default
When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

App. 14
In the United States District Court
For the District Of Massachusetts

Thomas Mitchell,
Plaintiff.....Civil Action
VS. Dr. B. Katz, Dr. M.L. Angeles, L.E. Dubois, W. Coalter , ARA Health Services, Inc., d/b/a Correctional Medical Systems, Inc., et al,

Defendants.

Plaintiff's Motion for T.R.O. Rule 65 (a)(b) Enjoining Defendants Torender Prompt And Immediate Medical Examination, Care And Treatment To Head, And All Other Injuries Received in False Imprisonment

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Comes now Thomas Mitchell, the Plaintiff, pro se, and respectfully moves this Honorable Court, without delay, and pursuant to its judicial powers to act SUE SPONTE in the EMERGENCY AND CONSEQUENCES OF IRREPARABLE HARM AND INJURIES BEFALLING PLAINTIFF AND THIS COURT'S RESPONSIBILITY TO INTERVIENE:

1. Issue a Temporary Restraining Order (T.R.O.) Pursuant to Rule 65(a) (b) fed.rules of civil procedure, on all pertenant –relevant claims presented in the plaintiff's civil complaint, attached hereto, especially requested in the PRAYER FOR RELIEF, and

2. Issue commands enjoining the defendants to require them to provide plaintiff to be treated for the injuries he received especially the injuries encompassing the circulation of blood in the arteries of the plaintiff's head; the causes and treatment for impairment of plaintiff's vision and loss of memory, all of which resulted from the fall and injuries received on April 17, 1996. At MCI-Concord.

3. Issue commands enjoining defendants to immediately schedule professional medical care and treatment by qualified doctors to examine care and treat plaintiff for the injuries which adversely affected his post-operative chest bone, structures, causing his sternum to become separated from the position affixed on October 23, 1995, before plaintiff was illegally prosecuted and imprisoned.

4. Issue commands enjoining defendants to pay all costs and expenses related to the medical care and treatment not with standing the status of the purported "Contract's validity and/or the existence of real corporation "Provider".

5. Issue commands enjoining defendants from transferring him, to any other facility to be held in false imprisonment, pending the adjudication of his habeas corpus against false imprisonment and this court's jurisdiction over this federal diversity civil action.

6. That this court accept in support of this motion the [4] Affidavits in support of the instant motion:

*Aff'd to support Proper Medical Treatment;

*Aff'd to support Examination of Plaintiff;

* Aff'd to support Testing of Blood Circulation;

* Aff'd to support Proper Medical Examination & Testing;

Signed Under The Pains and Penalty
of Perjury and The Laws of
United States

Nov. 5,1996

Thomas Mitchell Pro Se
NCCI PO Box 466
Gardner, MA 01440

AFFIDAVIT TO SUPPORT MOTION TO COMPELL THE DEFENDANTS TO PROVIDE PROPER MEDICAL TREATMENT.

The request for the motion to compel the defendants to provide proper medical treatment for the plaintiff is presented to your honor because the defendant, Maria Angeles acknowledges she has no experience in the type of injuries sustained by the plaintiff and the medical physician at the prison the plaintiff and the medical physician at the prison the plaintiff has been transferred to has not responded to the medical request for medical care by the plaintiff, although he states he knows the plaintiff has injuries that will someday be taken care of.

A letter to Dr. Maria Angeles, A part of the medical records entered with and as part of this action relates to the medical complications that could occur because of this fall which would greatly intensify the damages the plaintiff could sustain and the pain and suffering he would undergo.

Respectfully Submitted

Thomas Mitchell, Pro Se

AFFIDAVIT IN SUPPORT OF MOTION FOR EXAMINATION OF PLAINTIFF

The request for this motion to have the plaintiff examined is needed to provide proper care of the injuries sustained by the plaintiff because of his fall as the defendants have not to this date had the plaintiff fully examined and the periodic examinations provided by the defendants after many requests by the plaintiff for examinations and medical care have shown new injuries not previously known to the defendants because of lack of proper medical examinations or medical care the chief medical director who is a defendant in this action admitted more than once to the plaintiff that she did not have any experience in the injuries sustained by him because of his fall. On April 17, 1996 and other than the medical care given to the left wrist of the plaintiff no other medical care has been given

him the exception of Tylenol or Motrin for a limited amount of time, usually a few days.

The plaintiff is presently suffering pain in his shoulders and back, which the defendants tell him they don't know how to treat.

Respectfully Submitted

Thomas Mitchell Pro Se

AFFIDAVIT TO SUPPORT MOTION FOR TESTING OF BLOOD CIRCULATION

The plaintiff in this cause of action is requesting the attached motion to require the testing of the circulation in his head and the arteries supplying blood that affect his vision and memory ad this is a major concern of his health in the present and future which concerns are addressed in the research contained in the letter to Dr. Angeles. A part of the medical records made part of the exhibits of this cause of action. This testing also controls the amount of damages he will be seeking in this cause of action as without vision and memory he could not operate the business he has spent much money to obtain the necessary approvals from the department of environmental protection to build and operate, which with proper vision and memory could be operated after he leaves prison with no difficulty.

The above stated testing will also give to the defendants a fair appraisal of the future medical needs of the plaintiff so as to mitigate the damages as much as possible and if possible eliminate future medical complications for the plaintiff.

Respectfully Submitted

Thomas Mitchell, Pro Se

AFFIDAVIT TO SUPPORT MOTION FOR PROPER MECIAL EXAMINATIONS AND TESTING

The plaintiff, while being held at MCI at Concord, MA, experienced a severe fall due to the improper actions of

another inmate and the slippery conditions of a wet, waxed concrete and steel floor of the second tire of unit J2 of J Building. The plaintiff was sent immediately to the institution hospital where the medical director, Dr. Maria Angeles had an x-ray taken of his left wrist as it was swelling and turning black and blue.

The x-ray technician showed Dr. Maria Angeles which bone was broken. Dr. Maria Angeles then told the plaintiff to go back to his room as she did not know what to do next as she had not had any past experience with his type of injuries and needed to call someone to find out what to do next to repair his broken bone. The time was 10A.M..

At six P.M. the plaintiff was sent to the institutional hospital where a nurse placed a splint on the face of his left arm, wrist and hand, telling him they had to do something before he was taken the next day to Shattuck Hospital so it would appear they did something for him medically. The next day the plaintiff was taken to Shattuck Hospital, arriving there about ten thirty A.M. and within a few minutes he was seen by Dr. A. J. Ajeena, an orthopedic doctor. The x-rays sent with him were labeled Sharon Mitchell, not Thomas Mitchell. Dr. Ajeena looked at the x-rays and told the plaintiff they showed a broken bone in the left wrist however they were not identified as that of Thomas Mitchell so he better hope it was only a mistake of identity. He said that the x-rays indicated the bones were matched so the plaintiff did not need an operation as he was told he might need Dr. Ajeena. Then placed a cast on the plaintiff's arm, wrist and hand. As there was two Mitchell men in the same housing group as the one of the plaintiff only hopes at this time the x-rays were his. The plaintiff is experiencing severe pain in his shoulders, back and the bonework of his chest and has requested on a daily basis a proper printed request of medical care of the defendants and received only conferences with the medical staff including Dr. Maria Angeles, Medical Director and Prescribed Tylenol and Motrin as Dr. Maria Angeles told the plaintiff she does not know how to provide treatment for him as she has not previous experience with his type of injuries. There have been a few cardiograms taken along with his pulse and blood pressure. However no positive

examinations to determine the extend of injury or treatment. Four appointments have been made with Dr. A.J. Ajeena the orthopedic doctor to examine my left wrist to make sure it is mending properly and I have been told on each occasion he would tell me about my other injuries, however when I ask him about the other pain he tells me an cardiology surgeon is needed as he has no expertise in this area and cannot comment on these injuries or treatment for them. It has been over three months since the fall and the plaintiff is still in pain.

The only other responsible medical care the plaintiff has received was an x-ray ordered by Dr. Maria Angeles on June14, 1996 almost two months after the fall. The reports of this x-ray were related to the plaintiff on June 24, 1996 at which time he was told the medical staff had been advised the plaintiff has three crushed, broken ribs not previously discovered because there had been no medical examinations.

The plaintiff has been transferred to North Central Correctional Institution and requested medical care as the defendant correctional medical services contract with all prisons in this Commonwealth. The only difference being a different medical director and he tells the plaintiff he knows he has injuries but he doesn't know what to do to treat them. He doesn't even give Tylenol or Motrin to the Plaintiff. He only tells him not to send any more requests for medical care for the same injuries.

The plaintiff is requesting to have these examinations at a hospital not connected with the Commonwealth or the defendants.

Respectfully Submitted

Thomas Mitchell, Pro Se

App.16

RULE 7.1 MOTION PRACTICE

Control of Motion Practice

Motion Practice. No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.

App.17

United States District Court for the District of Massachusetts

Thomas Mitchell, C.A. No. 96-40220-NMG
Plaintiff

Vs.

Correctional Medical Services,
Inc., et al.,
Defendants

AFFIDAVIT OF ADRIENNE SAMETZ

Personally appeared before the undersigned officer, duly authorized by law to administer oaths in the State of Missouri, Adrienne Sametz who, being first duly sworn, swears and deposes as follows:

1. I am over twenty-one years of age, am under no legal disability, and otherwise am competent to give this affidavit. The matters sworn to in this affidavit are based upon my personal knowledge.

2. The defendants in this action, "ARA Health Services, Inc." and "Correctional Medical Systems, Inc.," are prior corporate names of the defendant, Correctional Medical Services, or "Correctional Medical System, Inc." presently exists.

3. "Correctional Medical Systems, Inc." changed its name to "ARA Health Services, Inc. d/b/a Correctional Medical Systems", on July 11, 1986.

4. "ARA Health Services, Inc." changed its name to "Correctional Medical Services, Inc." on October 10, 1994.

5. There has never been a corporate entity named: (1) "Correctional Medical Services, Inc." or (2) "Correctional Medical Systems, Inc., ARA Health Services, Inc. d/b/a

Correctional Medical Systems, Inc." as alleged in the plaintiff's complaint.

6. At all times relevant to plaintiff's claims, Bernard Katz, M.D. was independent contractor physician under contract with the defendant, Correctional Medical Services, Inc.

7. At all times relevant to Plaintiff's claims, Maria L. Angeles, M.D. was an independent contractor physician under contract with the defendant, Correctional Medical Services, Inc.

8. Because "Correctional Medical Services, Inc." and "Correctional Medical Systems, Inc." are the same legal entity, contractual rights and obligations with respect to the contract for health services it entered into with the Commonwealth of Massachusetts in July, 1994. The Commonwealth of Massachusetts was notified of the change in name of Correctional Medical Services, Inc.

Adrienne Sametz

Sworn to and subscribed
Before me this 29th day
Of January, 1997

Cheryl L. Fix
Notary Public-Nortary Seal
State of Missouri
St. Charles County
My Commission Expires Feb 20, 2000